

1-1-1974

# Loyola Law Students Consumer Journal

Loyola University of Los Angeles Law School

---

## Repository Citation

Loyola University of Los Angeles Law School, "Loyola Law Students Consumer Journal" (1974). *Loyola Consumer Protection Journal*.  
1.  
[http://digitalcommons.lmu.edu/consumer\\_protection\\_journal/1](http://digitalcommons.lmu.edu/consumer_protection_journal/1)

## Citation / Publisher Attribution

Copyright 1974, by Loyola Law Students  
Published by the students of Loyola University of Los Angeles School of Law  
1440 West Ninth Street, Los Angeles, California 90015



Loyola Law Students

# CONSUMER JOURNAL

LAW LIBRARY

SEP 11 1974

LOYOLA UNIVERSITY

**Articles:** UCC 2-302 A CONSUMER'S GUIDE TO  
UNCONSCIONABLE SALES CONTRACTS:  
..... Martin A. Frey

THE PONTIAC PROSPECTUS

..... Arthur Allen Leff

THE PERSONAL INFORMATION MARKET:  
AN EXAMINATION OF THE SCOPE AND  
IMPACT OF THE FAIR CREDIT REPORTING  
ACT

..... Albert A. Foer

DIETHYLSTILBESTROL: CANCER-CAUSING  
HORMONE USED TO FATTEN LIVESTOCK  
INTENDED FOR HUMAN CONSUMPTION

..... Joyce E. Brieman

**Comments:** USURY LAWS: ILLUSORY PROTECTION FOR  
THE NECESSITOUS BORROWER

X-RADIATION FROM TELEVISION RECEIVERS:  
HOW EFFECTIVE IS THE RADIATION  
CONTROL ACT OF 1968 IN ELIMINATING  
HAZARDOUS RADIATION?



# CONSUMER JOURNAL

---

Volume II — 1974

## TABLE OF CONTENTS

Articles:	Page
UCC2-302 A CONSUMER'S GUIDE TO UNCONSCIONABLE SALES CONTRACTS: <i>by Martin A. Frey</i> .....	5
THE PONTIAC PROSPECTUS <i>by Arthur Allen Leff</i> .....	25
THE PERSONAL INFORMATION MARKET: AN EXAMINATION OF THE SCOPE AND IMPACT OF THE FAIR CREDIT REPORTING ACT <i>by Albert A. Foer</i> .....	37
DIETHYLSTILBESTROL: CANCER-CAUSING HORMONE USED TO FATTEN LIVESTOCK INTENDED FOR HUMAN CONSUMPTION <i>by Joyce E. Bryman</i> .....	139
Comments:	
USURY LAWS: ILLUSORY PROTECTION FOR THE NECESSITOUS BORROWER.....	171
X-RADIATION FROM TELEVISION RECEIVERS: HOW EFFECTIVE IS THE RADIATION CONTROL ACT OF 1968 IN ELIMINATING HAZARDOUS RADIATION?.....	187

---

Copyright 1974, by Loyola Law Students  
Published by the students of Loyola University of Los Angeles School of Law  
1440 West Ninth Street, Los Angeles, California 90015

# CONSUMER JOURNAL

KENT M. BRIDWELL

*Editor-in-Chief*

MICHAEL A. GRIOTT

*Executive Editor*

MARIA C. RODRIGUEZ

*Student Works Editor*

RICHARD M. FINDER

*Articles Editor*

ALFRED W. GERISCH JR.

MARTIN S. REED

*Managing Editors*

## STAFF

DARRELL J. BADUREK

BERNHARD E. BIHR

GARY E. BITETTI

JOANNE BOCKIAN

DOUGLAS BUTLER

JAKE JOHN CHAVEZ

JACK HYLTON CLARK

ANTHONY T. DI BARI, JR.

JOHN R. FELITON, JR.

CARL G. JOSEPH

JAMES MORETON MAGID

ANNETTE MANN

DIANA R. MARSEL

NANCY L. MENZIES

CATHERINE JANE MORAN

MARISSA NOELANI PACKMAN

JOHN CLAY PIERSON

PAUL WM. POLIN

MICHAEL R. STEED

FRANCINE K. WEISS

ERIC R. YAMAMOTO

LOLA MC ALPIN-GRANT

*Faculty Advisor*



# CONSUMER JOURNAL

Dear Friends,

The 1973-'74 Loyola Consumer Law Journal staff has many people and groups they wish to thank for their support during the last year. It was a difficult year because many obstacles had to be overcome.

There were many persons who provided several kinds of support and help.

In particular we wish to thank:

THE LAW STUDENTS OF LOYOLA LAW SCHOOL for their generous financial support.

THE LAW FIRM OF LEVY, VAN BOURG & HACKLER for their timely financial support.

MR. GLEN RABENN for his dedication to the field of consumer law.

READY REPRODUCTIONS, INC. for extending to this Journal's staff their fullest cooperation.

It is our hope that the Loyola Consumer Law Journal will continue to provide students with an opportunity to exercise their legal writing skills and legal training.

MICHAEL R. STEED

*Editor*

## STAFF 1973-1974

NANCY L. MENZIES

*Student Works Editor*

GROVER MC KEAN

*Legislative Editor*

LEAH VAN ARSDALE

FERN SALKA

ANNETTE MANN

*Features Editor*

THOMAS A. PASHALIDES

*Managing Editor*

PRISCILLA KRAETZER

*Business Editor*

JACQUELINE YIP

RAYMOND L. STUEHRMANN

LOLA MC ALPIN-GRANT

*Faculty Advisor*

## EDITOR'S NOTE:

### *About the Consumer Protection Journal*

Perhaps the term "consumer law" denotes a somewhat illusory concept. The issues arising in this area of the law are, for the most part, derived from other, more traditional, topical fields of legal study. For instance, many of the remedies presently available to the aggrieved consumer are based on theories of tort (e.g., fraud, negligence in product design, etc.) or contract (e.g., breach of warranty, etc.). In a sense, then, this notion of "consumer law" partakes of most aspects of modern law and therefore would not seem to warrant treatment as a separate field of concern.

Yet, the body of law relating to the interests of the consumer *has* received widespread recognition as being a conceptually distinct legal sub-species. Law schools now offer classes in consumer law, governmental agencies have created consumer protection departments, many newly enacted statutes bear titles which include the word "consumer", and a number of private law firms have begun to "specialize" in representing consumers. Indeed, consumer problems have received an unprecedented amount of attention in recent years, and the rights of the consumer are currently undergoing a markedly rapid evolution. New statutes are being enacted almost daily, new cases decided, and new administrative procedures created which affect the legal status of this unique but pervasive class of persons. Thus, although the concepts involved under the heading "consumer law" may have originated from diverse legal doctrines, their concentrated application to the problems of the consumer certainly warrant their being considered in a specialized context.

A little over three years ago, while researching various consumer-related issues, several students at this school discovered the apparent lack of any legal publications dealing specifically with consumer problems on a regular basis. Contemplating the myriad legal questions created by the accelerated development of this field, they recognized the need for such a publication and began considering the possibility of initiating a specialized "law review" devoted exclusively to the discussion and treatment of consumer issues. After obtaining the school's approval for their project, they commenced laying the foundation for what eventually became the *Loyola Consumer Protection Journal*.

After enduring a problematic two-year period of gestation, the *Journal* was finally born in print during the summer of 1972. This issue marks the *Journal's* second publication.



The *Journal* was conceived with the notion that, due to the rapid emergence of consumer law, some means was needed to apprise the legal community of current and prospective developments in this field. In order to fulfill this need effectively, the *Journal* was designed to serve a dual function:

1. As a tool for legal research, and
2. As a forum for the discussion of consumer-related issues.

As part of its first function, the *Journal* will publish articles, comments, and notes to provide sources of persuasive authority for those researching consumer problems. To be of further use to the legal writer and the practitioner, the *Journal* will also present works intended to help clarify some of the more complex legal developments in the area of consumer protection. Such topics will include discussions of analysis, interpretation, and ultimate impact, of statutes and decisions of consumer importance.

The second function of the *Journal* is premised on the need for the continued refinement of consumer law. The *Journal* will provide a platform from which writers can express their views on the legal, social, and economic implications of consumer protection. Included will be proposals for new and revised legislation, broad discussions of governmental priorities and policies, and suggested approaches to isolating and alleviating various consumer problems.

The *Journal* will maintain an objective approach in the discussion of all consumer issues. It will not endorse positions taken by any of its writers, and will accept qualified works espousing any point of view.

Readers of the *Journal* are to be found throughout the United States, and in Australia and Canada. For the most part they are in fields directly related to the law, such as law students and professors, practicing attorneys, judges, legislators, governmental administrators, and legal organizations. So that this readership may best be served, the *Journal* will only publish works which conform to the following standards:

1. *Universal Significance*: Articles treating consumer problems of purely local interest will not be published. Discussions of local or state issues may be deemed appropriate, but only if they can serve an exemplary purpose or otherwise be of interest to readers in other jurisdictions.

2. *Substantial Consumer Impact*: Due to the enormous number and variety of consumer problems, the *Journal* will publish only topics concerning consumer problems of substantial social or economic importance.



3. *Legal Interest*: Works published in the *Journal* must relate to the law, as it contemplates or affects the interests of the consumer. Topics must have some bearing on the enforcement, administration, interpretation, or creation of the law. Issues of a "quasi-legal" nature (e.g., industry self-regulation, etc.) may also qualify for treatment in the *Journal*.

4. *Intellectual Standards*: The *Journal* will include only works which meet the requirement of originality; that is, they must raise new issues or provide novel insights into consumer problems. Furthermore, all works must be adequately supported by recognized authority (where appropriate), and must be written in a manner which most effectively conveys the author's ideas.

---

The *Journal* is still a very young publication. In order to insure its continued growth and refinement, the *Journal* welcomes comments and criticisms from its readers. It is only by way of such response that the *Journal* can be made to better serve the interests of the legal community. In addition, the *Journal* actively solicits manuscripts from readers, for publication in future issues.

On behalf of the *Journal*, I would like to take this opportunity to thank the students, faculty, and administration of Loyola University of Los Angeles, School of Law for the tremendous support they have manifested in favor of this publication. I would especially like to give recognition to Assistant Dean Lola McAlpin-Grant, without whose dedicated efforts the *Journal* could not have survived, and to Cary Medill and Glen Rabenn who are primarily responsible for the *Journal's* coming into being.

K.M.B.

Page 4  
(Blank)



## A CONSUMER'S GUIDE TO UNCONSCIONABLE SALES CONTRACTS

*Martin A. Frey\**

Traditional contract law has provided the consumer with relief in some of the more severe unconscionable contract situations; for example, usury, fraud and duress. Unfortunately for the consumer, not all unconscionable contracts come within established doctrines. Some sympathetic courts have strained to give the consumer relief by construing the contract language adversely to the merchant, by manipulating the rules of offer and acceptance, and by determining the unconscionable clause to be contrary to public policy or to the dominant purpose of the contract.<sup>1</sup> The drafters of the Uniform Commercial Code have supplied the consumer with relief;<sup>2</sup> under section 2-302, courts now can pass directly on the unconscionability of the contract or on a particular clause in that contract.<sup>3</sup>

Section 2-302 expressly authorizes the trial court to make a finding as a matter of law that a contract or a contract clause was unconscionable at the time it was made. Upon this finding, the court may tailor the contract to avoid the unconscionable result; it may refuse to enforce the contract; or it may delete the unconscionable clause and enforce the remainder of the contract.<sup>4</sup> At face value, this section seems a very potent weapon in the consumer's arsenal when faced with a merchant

\* Professor of Law, Texas Tech University. B.S.M.E. 1962, Northwestern University; J.D. 1965, Washington University; LL.M. 1966, George Washington University. I wish to thank Marilyn Shell, Junior law student, Texas Tech University, for her skilled assistance in research.

1. UNIFORM COMMERCIAL CODE § 2-302, Comment 1.

2. The unconscionability doctrine of 2-302 is broad enough to encompass the traditional doctrines of usury, fraud and duress as well as those situations which were not within the established doctrines. In application, however, the courts have shown a tendency to use the established doctrine when the facts so indicate rather than strike off into the uncharted sphere of 2-302. An example is *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970). The trial court held the installment sales contract unenforceable on two grounds: (1) fraud; and (2) unconscionability. The appellate court affirmed holding that the fraud ground was sufficient and therefore it was unnecessary to express an opinion on unconscionability.

3. UNIFORM COMMERCIAL CODE § 2-302, Comment 1. Unconscionability is a question of law and must be determined by the court and not by the jury. *Asco Mining Co. v. Gross Contracting Co.*, 3 UCC. REP. SERV. 293, 296 (Pa. Ct. C.P., Butler County 1965), holding that it was error for the Trial Court to submit the issue of unconscionability to the jury.

4. UNIFORM COMMERCIAL CODE § 2-302:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.



armed with a form contract. But is it? When can a contract be attacked as unconscionable? Are consumers in California under a severe disability since their legislature deleted 2-302 from the California version of the Code?

This article will not attempt to explore the history of 2-302; other authors have labored at that task and their efforts are readily available.<sup>5</sup> Nor will it prophesize on the future of this provision. Instead, this article is written for the consumer's attorney. It is intended to supply him with a check-list and guidelines for testing whether his client has a possible case of unconscionability. Before getting to the check-lists, however, it is necessary to take a moment to isolate the type of contract that will be dealt with and to put unconscionability in its factual setting.

The contracts under consideration involve the sale of goods by a merchant to a consumer. Implicit is the fact that non-sale of goods contracts will not be considered. This approach is consistent with the formal scope of article 2 of the Code (Sales).<sup>6</sup> The exclusion of non-sales contracts does not mean that these contracts cannot be held unconscionable under 2-302; the Code's influence extends far beyond its formal scope, and some non-sales contracts have been held unconscionable.<sup>7</sup>

---

5. E.g., Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337 (1970); Davenport, *Unconscionability and the Uniform Commercial Code*, 22 U. MIAMI L. REV. 121 (1967); Ellinghaus, *In Defense of Unconscionability*, 78 YALE L. J. 757 (1969); Leff, *Unconscionability and the Code--The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Leff, *Unconscionability and the Crowd--Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970); Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1 (1969); Shulkin, *Unconscionability--The Code, The Court and The Consumer*, 9 B. C. IND. & COM. L. REV. 367 (1968); Spanogle, *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931 (1969); Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

6. "Unless the context otherwise requires, this Article applies to transactions in goods...." UNIFORM COMMERCIAL CODE § 2-102. "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale...." *Id.* § 2-105(1). "In this Article unless the context otherwise requires 'contract' and 'agreement' are limited to those relating to the present or future sale of goods. 'Contract for sale' includes both a present sale of goods and a contract to sell goods at a future time. A 'sale' consists in the passing of title from the seller to the buyer for a price (Section 2-401)...." *Id.* § 2-106(1).

7. Contracts held unconscionable: *Fairfield Lease Corp. v. Pratt*, 6 Conn. Cir. Ct. 537, 278 A.2d 154 (1971) (lease agreement); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) (home improvement contract); *Educational Beneficial, Inc. v. Reynolds*, 324 N.Y.S. 2d 813 (Civ. Ct., N.Y. County 1971) (enrollment agreement between a school and a student); *David v. Manufacturers Hanover Trust Co.*, 4 UCC REP. SERV. 1145 (N.Y. Civ. Ct., Kings County 1968) *rev'd*, 59 Misc. 2d 248, 298 N.Y.S. 2d 847 (App. T. 1969) (checking account contract); *cf. In re Elkins-Dell Mfg. Co.*, 253 F. Supp. 864 (E.D. Pa. 1966) (contract to advance money against the assignment of accounts receivable). *Contra, In re Advance Printing & Litho Co.*, 387 F.2d 952 (3d Cir. 1967) (holding that § 2-302 applies to sales but not to security transactions); *Hernandez v. S.I.C. Fin. Co.*, 79 N.M. 673, 448 P.2d 474 (1968) (holding that § 2-302 applies to sales but not to security transactions); *cf. Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S. 2d 264 (Sup. Ct. 1969) (in which an attempt to make the sales contract into a security agreement failed). See also *E.F. Lynch, Inc. v. Piccirilli*, 28 Mass. App. Dec. 49 (Boston Mun. Ct. 1964) (lease agreement: reversed because trial court failed to hold a hearing on unconscionability); *United States Leasing Corp. v. Franklin Plaza Apartments, Inc.*, 319 N.Y.S. 2d 531 (Civ. Ct., N.Y. County 1971) (lease agreement: plaintiff's motion for summary judgment denied because a hearing on the



Their exclusion from this article means only that the results in these cases may or may not be dictated by factors relevant to 2-302 and this, at least in the first instance, may be misleading when isolating the indicators for unconscionability under 2-302.

Contracts involving sales between merchants also will not be considered except for the following discussion on how to determine whether the contract concerns a "consumer" or a "between merchants" sale. The merchant is a person with special knowledge or skill peculiar to the practices or goods involved in the transaction.<sup>8</sup> The "between merchants" transaction occurs when both parties are chargeable with the knowledge or skill of merchants.<sup>9</sup> The indicators in a "between merchants" case, because of knowledge and skill of both contracting parties, may be slightly different from those in the consumer-merchant situation and may instill a possible source of distortion, and therefore are excluded from consideration.<sup>10</sup>

---

unconscionability issue was necessary); *Fairfield Lease Corp. v. George Umbrella Co.*, 8 UCC REP. SERV. 184 (N.Y. Civ. Ct., N.Y. County 1970) (lease agreement: reversed because trial court failed to hold a hearing on unconscionability); *Fairfield Lease Corp. v. Umberto*, 7 UCC REP. SERV. 1181 (N.Y. Civ. Ct., N.Y. County 1970) (lease agreement for coffee machines); *Kaye v. Coughlin*, 443 S.W. 2d 612 (Tex. Civ. App.--Eastland 1969, no writ) (contract for sale of real estate: no unconscionable provision).

The Uniform Consumer Credit Code § 5.108 is similar to UCC § 2-302 but is applicable to consumer credit sales, consumer leases, and consumer loans. It provides:

(1) With respect to a consumer credit sale, consumer lease, or consumer loan, if the court as a matter of law finds the agreement or any clause of the agreement to have been unconscionable at the time it was made the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) If it is claimed or appears to the court that the agreement or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination.

(3) For the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.

---

8. A "merchant" is defined by the Code to be "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." UNIFORM COMMERCIAL CODE § 2-104(1).

9. *Id.* § 2-104(3).

10. Several illustrations of merchant-merchant cases are: *County Asphalt, Inc. v. Lewis Welding & Eng'g Corp.*, 323 F. Supp. 1300 (S.D.N.Y. 1970); *Romine, Inc. v. Savannah Steel Co.*, 117 Ga. App. 353, 160 S.E.2d 659 (1968); *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495, 333 N.Y.S.2d 818 (Sup. Ct., N.Y. County 1972); *Division of Triple T. Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720, 304 N.Y.S.2d 191 (Sup. Ct., Westchester County 1969); *Whitestone Credit Corp. v. Barbory Realty Corp.*, 5 UCC REP. SERV. 176 (N.Y. Sup. Ct., Queens County 1968); *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446, 273 N.Y.S.2d 364 (Sup. Ct., Suffolk County 1966); *Central Ohio Co-op Milk Producers, Inc. v. Rowland*, 29 Ohio App. 2d 236, 281 N.E.2d 42 (1972).



It is important to note at this juncture that the cases that have raised the unconscionability argument fall into several factual patterns. The most common involves a merchant who has sold goods to a consumer on a time payment contract. The consumer makes a number of payments and then fails to make the next payment when due. The merchant brings a contract action against the consumer for the balance due or to recover the goods. The consumer answers by raising the unconscionability of the price term as a defense to the contract action.<sup>11</sup>

Under these same facts, the consumer need not wait for the merchant to sue. The consumer may take the initiative. He could bring suit against the merchant to reform the price term so that the contract sales price (and service charges) would correlate to the price paid. By these tactics, the consumer could retain the merchandise and free himself from making further payments.<sup>12</sup> While these two illustrations refer to the unconscionability of the price term, other terms, as will be discussed later, may be unconscionable as well.

## I. THE CHECK-LISTS

The text of the Code, by its silence in defining what are unconscionable contracts and clauses, has led to uncertainty and speculation concerning definition. A number of cases, by being merely conclusionary, shed no light on the definition and its components.<sup>13</sup> A few other cases do refer to definitions. Two similar yet different formulations currently

---

11. *E.g.*, *Toker v. Westerman*, 113 N.J. Super. 452, 274 A.2d 78 (N.J. Dist. Ct. 1970); *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on the damage issue*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

12. *E.g.*, *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau County 1969).

13. *E.g.*, *In re Jackson*, Bankruptcy No. 40666, 9 UCC REP. SERV. 1152 (W.D. Mo. 1971) (title retention provisions of a charge-all agreement for the entire amount was unconscionable); *Dean v. Universal C.I.T. Credit Corp.*, 8 UCC REP. SERV. 1113 (N.J. Super. Ct., App. Div. 1971) (dictum stated that a clause not to assert defenses against an assignee and a clause providing a 5-day time limit for claiming collateral in a repossessed automobile were unconscionable); *Kosches v. Nichols*, 327 N.Y.S.2d 968 (Civ. Ct., N.Y. County 1971) (dictum stated that clauses limiting the right of the consumer to move, or permitting the merchant to declare a default if the consumer dies or the merchant with reasonable cause determines the goods to be in jeopardy, or giving the merchant the right to enter a consumer's residence and seize the goods without a court order, may be unconscionable); *Zachary v. R.H. Macy & Co.*, 66 Misc. 2d 974, 323 N.Y.S.2d 757 (Sup. Ct., N.Y. County 1971) (credit contract not unconscionable); *Paragon Homes of New England, Inc., v. Langlois*, 4 UCC REP. SERV. 16 (N.Y. Sup. Ct. 1967) (dictum stated that a clause specifying jurisdiction for litigation purposes would have been unconscionable were not the action dismissed on other grounds).



are developing: one emanates from the comments to the Code and the other from the pre-Code case of *Williams v. Walker-Thomas Furniture Co.*<sup>14</sup> In the following material these formulations will be isolated and discussed separately and then brought together and compared for similarities and differences.

### A. The Comment 1 Formulation

The closest the Code comes to a definition for unconscionability is in the comments to 2-302. Comment 1 provides the following circular and somewhat obscure statement:

"The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise. . . . and not of disturbance of allocation of risks because of superior bargaining power."<sup>15</sup>

Based on this language and the cases which will be discussed subsequently, the following *check-list for unconscionability* can be developed:

1. Identify the one-sided clause. This will be a term for which the merchant is bargaining.
2. Identify the general commercial background (also known as the commercial setting) at the time of the contracting. Include facts about this contract and related contracts and dealings between the parties.
3. Identify the commercial needs of the particular trade or case at the time of contracting. Include facts which explain or tend to justify the merchant's position regarding the one-sided clause.

14. 350 F. 2d 445 (D.C. Cir. 1965). *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970), refers to neither Comment 1 nor *Walker-Thomas*. Instead it refers to the following passage in *Carter v. Boone County Trust Co.*, 338 Mo. 629, 92 S.W.2d 647, 657 (1936), which appears in WORDS AND PHRASES. An unconscionable contract has been defined as:

one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other. To what extent inadequacy of consideration must go to make a contract unconscionable is difficult to state, except in abstract terms, which gives but little practical help. It has been said that there must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it.

In *Toker*, a price term with a price-value disparity of 2.2 or more to 1 was held to be unconscionable.

15. UNIFORM COMMERCIAL CODE § 2-302, Comment 1. For criticism of this test, see J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 116 (1972).



4. Evaluate the one-sidedness of the clause in the light of the general commercial background and the commercial needs of the trade or case. Was the clause a product of the merchant's oppressive practices and, if so, would the clause shock the conscience of the court?

Based on the limited number of consumer-merchant sales cases which have discussed Comment 1,<sup>16</sup> the following materials develop and illustrate the check-list's rough guidelines. The first, and probably the simplest step, is the identification of those clauses that the consumer will claim to be one-sided in favor of the merchant. These are the clauses for which the merchant was bargaining. Illustrative are price terms, conditions precedent to warranties, waivers of defenses, and title retention provisions.

Next, identify the general commercial background at the time of contracting. The commercial background or commercial setting should include the events leading up to the contracting, and will help to explain how and why the one-sided term found its way into the contract. For example, in *Frostifresh Corp. v. Reynoso*,<sup>17</sup> the contract for the refrigerator-freezer was negotiated orally in Spanish between the consumers and a Spanish speaking salesman representing the merchant. In that conversation the consumer husband told the salesman that he had but one week left on his job and he could not afford to buy the appliance. The salesman distracted and deluded the consumers by advising them that the appliance would cost them nothing because they would be paid bonuses or commissions of \$25 each on the numerous sales that would be made to their neighbors and friends. Thereafter the consumers signed a retail installment contract entirely in English, which was neither translated nor explained to them. In that contract there was a cash sales price of \$900 and a credit charge of \$245.88, making a total of \$1145.88. The refrigerator-freezer cost the merchant \$348.

The commercial background need not be limited to the one contract in which the one-sided term appears. It may include related contracts and dealings between the parties. If the consumer desires to go beyond the one contract, then he must supply facts which show that this extrinsic material is relevant. *Milford Finance Corp. v. Lucas*<sup>18</sup> presents an excellent illustration of the expansion of the scope of the general commercial background beyond the single contract in question. In *Milford*

16. *Milford Fin. Corp. v. Lucas*, 8 UCC REP. SERV. 801 (Mass. App. Div. 1970) (judgment for merchant's assignee reversed since the trial court erred in excluding evidence of commercial background relevant to the decision of unconscionability); *Melcher v. Boesch Motor Co.*, 188 Neb. 522, 198 N.W.2d 57 (1972); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

17. 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966).

18. 8 UCC REP. SERV. 801 (Mass. App. Div. 1970).



*Finance* the consumers (husband and wife), in response to a post card informing them that they had "won a free Miami Beach vacation for two," called a telephone number to redeem the vacation. They were subsequently visited by a salesman for Northeast Food Service. He inquired how much they spent each week on meat for the family and if they might be interested in a frozen food plan. He stated that Northeast would supply them with the finest choice of meats delivered to their home for \$12 per week, or 20¢ per week more than they had been paying. The consumers asked how often the meats were delivered and were told every six months. When they said that the freezer section of their refrigerator was not capable of holding such a large quantity of food, the salesman said that if they agreed to purchase frozen meat from Northeast for three years, they would be supplied a freezer at no extra charge.

The salesman presented the consumers with a Northeast Food Service Membership Bond and Guarantee and then produced two documents which he requested the consumers to execute. One was entitled "consumer note" and was in the amount of \$195.24, payable in four equal payments of \$48.81. The other was the retail installment sales agreement in the amount of \$1,050.84 payable in 36 equal payments of \$29.19. When the consumers saw the latter they said it was too much to pay for a freezer. The salesman said the freezer payments were included in the food payments and both amounted to \$12 per week. The salesman said the only reason that they were required to sign the retail installment sales agreement was to insure that they purchased their meats from Northeast for at least three years. The consumers subsequently paid \$624 (\$12 x 52 weeks) and received one year's supply of meat. Northeast then went out of business and no further meat deliveries were made.

In the interim, the installment sales agreement had been assigned from Northeast to Milford Finance. When the consumers did not receive deliveries, they refused to make any further payments and requested that Milford Finance remove the freezer. Milford, as assignee of the freezer contract, brought action against the consumers for the unpaid balance. The consumers contended that the total time sales price of \$1,050.84 was so excessively high as to make the entire retail installment sales agreement unconscionable and unenforceable. From *Milford Finance* it may be seen that evidence is relevant to expand the scope of the hearing from the one contract being challenged to include other contracts and other dealings between the parties which comprise a greater transaction.



In *Milford Finance*, the following acts demonstrated that the scope should be expanded. The post card which informed the consumers that they had "won a free Miami Beach vacation for two"; the subsequent visit by a salesman for Northeast; the lead into the frozen food plan; the signing of the note, bond and guarantee and the sales agreement, all on the same day; and the fact that the food was a necessary requirement of the freezer contract, demonstrated that the contract for the freezer was an integral part of the food contract. The evidence surrounding the manner in which the consumers were induced to sign up for the food service and for the purchase of the freezer was admissible, to show that the freezer payments were included in the food payments. The evidence concerning the Northeast Food Service Membership Bond and guarantee was introduced to show that Northeast's agent was not merely selling a freezer unit to the consumers, but also that he had made certain representations about a frozen food plan, upon which representations the consumers had relied. Once the scope was expanded, evidence surrounding the manner in which the consumers were induced to become involved with any aspect of the whole transaction was relevant to show that the merchant had engaged in deceptive practices during the negotiation of the freezer contract. Finally, the fact that the consumers paid the monthly payments up until the time that they were unable to procure any more food demonstrated their good faith.

Next, identify the commercial needs of the particular trade or case at the time of contracting. These facts will be used to explain the merchant's position regarding the one-sided clause. Are there facts that justify such a clause? Consider, for example, the commercial needs that influence the setting of the ultimate price to the consumer. Included are the net cost of the goods to the merchant, a reasonable profit, commissions to be paid to salesmen, possible collection and legal fees, trucking and service charges necessarily incurred, reasonable finance charges, and other matters of overhead.<sup>19</sup>

Finally, evaluate the one-sidedness of the clauses in the light of the general commercial background and the commercial needs of the trade or case. Was the clause so one-sided at the time of contracting as to be unconscionable? Comment 1 states that a finding of unconscionability will lie only when it is necessary to prevent oppression and unfair surprise. While this language is conjunctive -- "oppression *and* unfair

---

19. *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).



surprise" -- the cases refer only to oppression and thus treat the terms as disjunctive.<sup>20</sup>

Most cases provide little help in evaluating whether a clause is so one-sided as to be unconscionable.<sup>21</sup> Of the few that have referred to the Comment 1 formulation, some have been cases where the trial court has erroneously excluded evidence relevant to the unconscionability finding, and therefore are of little help in pinpointing unconscionability. Two cases, *Melcher v. Boesch Motor Co.*<sup>22</sup> and *Frostifresh v. Reynoso*, do shed some light on the application of the Comment 1 formulation. In *Melcher*, a consumer purchased a new pickup truck from a dealer. From the beginning, the truck used an abnormal amount of oil. When it had been driven nearly 25,000 miles, it threw a connecting rod and destroyed the engine. The consumer brought action against the dealer and the manufacturer for damages for breach of the manufacturer's express warranty that the vehicle was free from defects in material and workmanship. The dealer and the manufacturer defended on the ground that the consumer had failed to comply with the conditions precedent to the warranty -- that is, the service requirements and the required certification of such compliance. The consumer replied that he had performed the required maintenance and that the requirement that he obtain from the dealer a certification of compliance was unconscionable and unreasonable and therefore unenforceable.

After quoting the Comment 1 formulation, the court held that the certification requirement was not unconscionable. It must be emphasized that the court found the requirement not unconscionable, not by discussing whether it was "oppressive" or led to "unfair surprise", but instead by whether it was "unreasonable." In finding the basis for the certification clearly reasonable, the court noted that the requirement of a consumer that he maintain the engine of his vehicle properly, in exchange for a warranty that the vehicle be free of defect in material and workmanship at time of delivery, go hand-in-hand. Also, the required certification did not put the manufacturer and the dealer in the position of sole arbiters as to what is sufficient maintenance. The manufacturer and the dealer did not have the unqualified right under the clause to refuse the certification and defeat the consumer's claim.

20. *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966). For a discussion of "unfair surprise" and "oppression," see D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 710-12 (1973).

21. *Milford Fin. Corp. v. Lucas*, 8 UCC REP. SERV. 801 (Mass. App. Div. 1970) (Based on the discussion on appeal, the unconscionability decision would appear to hinge on the merchant's deceptive practices versus the consumer's good faith).

22. *Supra* note 16.



While the consumer must furnish the dealer with evidence of performance of the required maintenance services, the dealer may not unreasonably withhold the certification. If the manufacturer and the dealer could arbitrarily refuse to recognize the fact that the service was properly performed and thus deny the certification, the certification requirement would be unreasonable and the condition precedent that the consumer obtain the certification would be waived. Thus construed, the certification provision is not unreasonable.

While the *Melcher* contract was not unconscionable, the *Frostifresh* contract was. *Frostifresh* provides the following clue to unconscionability: It is not oppression alone, according to the Comment 1 formulation, that causes a contract to be unconscionable. If it were, then the problem would seem to revert to a reallocation of the risk, which Comment 1 expressly rejects. Instead, it is *oppression that shocks the conscience of the court*. In *Frostifresh*, the court noted that the service charge (\$245.88), which almost equalled the price of the refrigerator-freezer (\$348), was in and of itself indicative of the oppression which was practiced on the consumers. In addition, the consumers were handicapped by a lack of knowledge both as to the commercial situation and as to the nature and terms of the contract, which was submitted in a language foreign to them. These oppressive practices led the court to conclude that the contract was "too hard a bargain". The sale of the appliance at the contract price was shocking to the conscience of the court. The conscience of the court would not permit the enforcement of the contract as written.<sup>23</sup>

#### B. The Walker-Thomas Formulation

The more commonly cited formulation, emanating from the case of *Williams v. Walker-Thomas Furniture Co.*, defines unconscionability as including *an absence of meaningful choice* on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.<sup>24</sup> The following check-list directs attention to the relevant factors:

1. The consumer must have had a meaningful choice at the time of contracting.

- a. The consumer must have had a reasonable opportunity to understand the contract terms. An important term must not have been hidden in a maze of fine print; nor must an important term have been

---

23. *Frostifresh v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966); cf. *Star Credit Corp. v. Molina*, 59 Misc. 2d 290, 298 N.Y.S.2d 570 (Civ. Ct., N.Y. County 1969) (consumer failed to submit evidence of the freezer's actual value, which made a determination of the unconscionability of the price term impossible).

24. 350 F.2d 445 (D.C. Cir. 1965).



obscured by deceptive sales practices; nor must the consumer have been denied the opportunity to understand the term due to a lack of education or some other disability.

b. In addition, the consumer must have had the power to bargain about the term. He must not have lacked the power to shop comparatively due to limited financial resources or because all merchants dealing in the desired item uniformly use the same commercial form or charge the same price.

c. If the consumer lacked a meaningful choice at the time of contracting, then an inequality of bargaining power existed. However, only a *gross* inequality of bargaining power will constitute the requisite absence of meaningful choice. Was the inequality of bargaining power gross?

2. The merchant must not have taken advantage of the customer's absence of meaningful choice by including a term unreasonably favorable to himself in the contract.

a. Identify the favorable term. This will be a term for which the merchant is bargaining.

b. Identify the circumstances that existed at the time of contracting. Did these circumstances make the favorable term *unreasonably* favorable to the merchant? Specifically, did the merchant *knowingly* take advantage of the consumer's absence of meaningful choice? Considering only the consumer's evidence of circumstances, does this advantage appear unreasonable? Were there commercial needs for the particular trade or case that justified the merchant in including into the contract what appeared to be an unreasonably favorable term? If the advantage appears unreasonable and there are no commercial needs that justify the merchant's position, then the term is unconscionable.

The following materials develop and illustrate the rough guidelines of the check-list: (1) For unconscionability, the consumer must lack a meaningful choice at the time of contracting. (2) Whether a meaningful choice is present in a particular case can only be determined by considering all the circumstances surrounding the transaction.<sup>25</sup> (3) Meaningful choice is directly related to bargaining power, and bargaining power is a composite of knowing what to bargain for and the ability to bargain for it.

The consumer, when signing the contract, must at least have had a **reasonable opportunity to know and understand its terms.** This

25. *Id.* The consumer is entitled to a hearing to present evidence as to the commercial setting. Therefore, the merchant is not entitled to a summary judgment. *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 279 N.Y.S.2d 391 (Civ. Ct., N.Y. County 1967).



opportunity may not exist if the important terms are hidden in a maze of fine print, or if they are minimized or obscured by deceptive sales practices. An example of the latter occurred in *Toker v. Perl*,<sup>26</sup> where the merchant's salesman arrived at the consumer's home for a prearranged appointment. For the first two and one-half hours of the three hour interview, the discussion centered around food plans that could be arranged by the merchant. No mention was made of a freezer. Sometime within the last one-half hour, when it became apparent that the plan called for the purchase of 18 weeks of food at a time, the consumers mentioned that they had no facilities to store such a large quantity of food. The salesman replied that a freezer was included in the food plan. Following the explanation of the food plan, the salesman presented three forms for signing. He informed the consumers that the documents were for 18 weeks of food. The forms were placed one on top of the other, leaving visible only the signature line on the lower two forms. The top page was the food plan contract. The next day when the consumers examined the papers, they discovered that in addition to the food plan they had signed a financing application and an installment contract for a freezer.

The opportunity to understand the terms may not exist when the consumer suffers from a lack of education or a language barrier. For example, a Spanish-speaking consumer, with at best a sketchy knowledge of the English language, may neither know nor understand when he signs a contract printed entirely in English that he is waiving all implied warranties, despite the fact that the waiver is printed in the contract in large black type.<sup>27</sup> At times even a consumer with a sound basic education and without language problems may be unable to understand the contract even if he reads it, due to the drafting skill of the merchant's form writer.<sup>28</sup> In either case, the consumer who signs the contract with little or no knowledge of its terms, signs without choice.<sup>29</sup>

A "smart" consumer knows and understands what is in the contract. But what terms can this consumer get? Is the consumer free to indulge in comparative shopping? The answer may be that he is physically able but, due to his very limited financial resources<sup>30</sup> or the fact that all merchants dealing in the desired items uniformly use the same commercial form, or charge the same price,<sup>31</sup> comparative

26. 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970).

27. *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969).

28. *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971).

29. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

30. *Block v. Ford Motor Credit Co.*, 286 A.2d 228 (D.C. Ct. App. 1972), *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

31. *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971).



shopping is not practiced. Or, the consumer may be physically able to shop comparatively, but be psychologically unable to do so because the merchant calls on the consumer in the consumer's own home.<sup>32</sup> Without the power to do effective comparison shopping, the consumer has little bargaining power, little real choice.

Only a gross inequality of bargaining power will constitute the requisite absence of meaningful choice.<sup>33</sup> Although our research did not uncover a case which defined the distinction between *gross* and *less-than-gross* inequality of bargaining power, some guidance can be gleaned from the ultimate conclusions of the courts on the unconscionability issue. It appears from these cases that only one of the factors from the check-list is necessary for the inequality of bargaining power to be gross.<sup>34</sup> If more than one factor is present at the time of contracting, all the better. What is critical is the *severity* of the inequality developed within that factor. Showings of deceptive sales practices, language barriers, and limited financial resources have been sufficient to support conclusions of unconscionability; but it appears that the psychological factor of being trapped by a salesman in one's own home is not strong enough by itself to be relied upon to show gross inequality, and should only be used in conjunction with another factor to strengthen that other factor.

Absence of meaningful choice alone will not warrant a finding of unconscionability. Absence of meaningful choice is only one-half of the two-pronged *Walker-Thomas* test. For a clause to be unconscionable, the merchant must *knowingly* have taken advantage of the consumer's absence of meaningful choice by including in the contract a term unreasonably favorable to the seller.

Was the term favorable to the merchant? Illustrative are such terms as waiver of implied warranties of merchantability and of fitness for a particular purpose, acceleration clauses, and price terms. The merchant benefits at the consumer's expense.

A term favorable to the merchant does not automatically make the term unconscionable. Freedom to contract permits and encourages

32. See *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970).

33. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

34. In *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), the price term was found unconscionable since it had been obscured by deceptive sales practices. In *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969), the waiver of warranties was found unconscionable because the consumer was denied the opportunity to understand the waiver clause due to a lack of education in English. In *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969), the price term was held unconscionable as the consumer, a welfare recipient, had only very limited financial resources.



each contracting party to bargain for terms most favorable to himself. The limitation (in addition to good faith)<sup>35</sup> is that circumstances must not exist at the time of contracting which would make the favorable term *unreasonably* favorable to the merchant. In determining reasonableness or fairness of the terms, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. Existing circumstances encompass the general commercial background and the commercial needs of the particular trade or case.<sup>36</sup> Did the merchant knowingly take advantage of the consumer's absence of meaningful choice?<sup>37</sup> The merchant knowingly takes advantage when he leads the consumer to believe that his signature to a contract is not for the purchase of merchandise, when in fact it is.<sup>38</sup> Knowingly taking advantage may be implied when a merchant, dealing at arms length with the consumer who has a severe language barrier, fails to explain the terms favorable to the merchant so the consumer can understand. Or it may be implied from the price-value disparity when the merchant knows that the consumer's limited financial resources make it impossible for him to buy from others.

Considering only the consumer's evidence of circumstances, does the advantage gained by the merchant appear unreasonable? In *Jones v. Star Credit Corp.*,<sup>39</sup> a price-term case, the court considered whether the mathematical price-value disparity was exorbitant on its face and concluded that it was oppressive. The court then used the language that the price imposed on these consumers for this appliance shocked the conscience of the court. This occurred when the price-value disparity was in excess of 2.5 to 1.

Commercial needs provide the merchant with an opportunity to justify the existence of favorable terms. When the challenged term is price, the merchant's defense may be based on the necessity and even the desirability of installment sales and the extension of credit. There are many, including but not necessarily limited to the poorest members

---

35. The Code provides that "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." UNIFORM COMMERCIAL CODE § 1-203. This obligation of good faith underpins the entire Code. The consumer's obligation of good faith means "honesty in fact in the conduct or transaction concerned." *Id.* § 1-201(19). The merchant has a higher obligation. "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Id.* § 2-103(1)(b).

36. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

37. *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau County 1969).

38. *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), *aff'd on other grounds*, 108 N.J. Super. 129, 260 A.2d 244 (App. Div. 1970).

39. 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *accord*, *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970) (2.2-2.5 to 1); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968) (2.7 to 1). *Contra*, *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971) (2.5 to 1 was not unconscionable).



of the community, who would be deprived of even the most basic conveniences without the use of these devices. Similarly, the retail merchant selling on installment or extending credit is expected to establish a pricing factor which will afford a degree of protection commensurate with the risk of selling to those who might be default-prone.<sup>40</sup> In addition, mark-ups vary from industry to industry. A high mark-up in one industry might be low in another.<sup>41</sup> To be successful in his unconscionability claim, a consumer must know the mores and business practices of the time and place or the merchant may readily justify his favorable term.

### C. A Comparison

The Comment 1 and the *Walker-Thomas* formulations are similar in that both focus on the term favorable to the merchant. Under both, the favorable term must be considered in light of the circumstances existing at the time of contracting that would make the favorable term so oppressive or unreasonably favorable to the merchant that the conscience of the court is shocked. In both, the merchant is given an opportunity to present evidence of the circumstances that would justify his inclusion into the contract of what appears to be an oppressive or unreasonably favorable term.

The difference between the formulations is that the Comment 1 test appears to end with what already has been said. The *Walker-Thomas* test adds a second area of consideration which must be considered even before the favorable term: There must be an absence of meaningful choice. The merchant, when including the unreasonably favorable term must have done so in the spirit of knowingly taking advantage of the consumer's lack of meaningful choice. Therefore, in comparison, the *Walker-Thomas* test appears more restrictive.

What significance does this have for the consumer who is attempting to raise a defense of unconscionability? Based on the limited num-

40. *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *accord*, *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970) (less overhead due to door-to-door salesmen and no showroom or store).

41. *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971). Before a merchant is required to divulge his pricing policies through interrogatories or through the production of records in court, the consumer must assert his claim with some degree of detail. *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111 (D.C. Ct. App. 1971).

*Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250, 253 (1972), gives some pointers in the warranty area:

There is obviously a point at which the warranty limitation must be considered unconscionable—for example if, due to defective manufacture or failure to repair by failing to place a 25 cent nut on the proper bolt, the brakes fail and a collision occurs resulting in heavy property damage and personal injury, courts might well be loath to limit the manufacturer's or seller's liability to the sum of twenty five cents.



ber of reported decisions, the choice of tests does not appear to be jurisdictional. The same courts have used both formulations on different occasions.<sup>42</sup> Nor does the choice appear to be based on the type of term being challenged. Both tests have been used for price terms<sup>43</sup> and for non-price terms.<sup>44</sup>

Does this mean that there is only one test -- a test which requires the merchant to have included the unreasonably favorable term in the spirit of knowingly taking advantage of the consumer's lack of meaningful choice? Based on the three cases that have used the Comment 1 test, all would come to the same result under *Walker-Thomas*. In *Milford Finance*, the food plan/freezer case, the consumers lacked a meaningful choice at the time of contracting since the price term was obscured by deceptive sales practices. In *Frostifresh Corp.*, the refrigerator-freezer case, the consumers lacked a meaningful choice at the time of contracting since they could not understand the contract terms due to a lack of education. In *Melcher*, the automobile warranty case, the consumer lacked a meaningful choice since he did not have the power to do comparison shopping, due to the fact that all merchants dealing in the desired item uniformly used the same commercial form. Unlike the other two cases, the advantage gained by the merchant in *Melcher* was not unreasonable under the circumstances. The certification, which was the condition precedent to the validity of the warranty, could not be denied arbitrarily.

The consumer would be well advised to plead and prove both absence of meaningful choice and unreasonable terms.<sup>45</sup> This will avoid the consumer's predicament in *Patterson v. Walker-Thomas Furniture*

42. New York Supreme Court, Nassau County: compare *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Sup. Ct. 1966) (Comment 1 formulation) with *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969) (*Walker-Thomas* formulation).

43. Comment 1 formulation: *Milford Fin. Corp. v. Lucas*, 8 UCC REP. SERV. 801 (Mass. App. Div. 1970); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966). *Walker-Thomas* formulation: *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968).

44. Comment 1 formulation: *Melcher v. Boesch Motor Co.*, 188 Neb. 522 (1972) (condition precedent to the validity of a warranty). *Walker-Thomas* formulation: *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 302 N.Y.S.2d 390 (Civ. Ct. 1969) (waiver of implied warranty); *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971) (acceleration clause).

45. Unconscionability, when used as an affirmative defense, must be pleaded by the defendant. *Asco Mining Co. v. Gross Contracting Co.*, 3 UCC REP. SERV. 293, 296 (Pa. Ct. C.P., Butler County 1965). A sufficient factual predicate for the defense must be alleged before wholesale discovery will be allowed. An unsupported conclusory allegation in the answer that a contract is unenforceable as unconscionable is not enough. Sufficient facts which surround the commercial setting of the contract at the time it was made should be alleged so that the court may form a judgment as to the existence of a valid claim of unconscionability and the extent to which discovery of evidence to support that claim should be allowed. *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 114 (D.C. Ct. App. 1971) (the answer asserted the affirmative defense of unconscionability only on the basis of a stated conclusion that the price was excessive--held insufficient).



Co.<sup>46</sup> There the consumer alleged only the unreasonable term. The court held that without alleging absence of meaningful choice, the allegations were insufficient to state a claim of unconscionability.

## II. THE CONSUMER'S POSITION IN CALIFORNIA: CAN THERE BE PROTECTION FROM UNCONSCIONABILITY WITHOUT LEGISLATION?

Section 2-302 of the 1962 Official Text of the Uniform Commercial Code was omitted from the California version.<sup>47</sup> A California State Bar Committee explained that the decision to delete was based on the belief that giving courts unqualified power to strike down terms they might consider unconscionable could result in the renegotiation of contracts in every case of disagreement with the fairness of the provisions the parties had accepted.<sup>48</sup>

Are the California consumers severely hampered by the legislature's rejection of 2-302 -- action which prevents the California courts from ruling openly on unconscionability? Naturally, the deletion of 2-302 may dictate that the courts will proceed with caution when faced with a situation which requires an expansion of their power. On the other hand, the courts need not refrain from doing what they have been doing, or from taking advantage of the provisions in the Code which have not been deleted. Case law exists in California that indicates unconscionability, as a public policy doctrine, was a part of California's common law prior to the legislature's adoption of the Code.<sup>49</sup>

46. 277 A.2d 111 (D.C. Ct. App. 1971); *accord*, *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971), *aff'd*, 8 UCC REP. SERV. 321 (D.C. Gen. Sess. 1970). It should be noted that these cases are from the District of Columbia, the same jurisdiction as *Williams v. Walker-Thomas Furniture Co.* This may explain the court's precision concerning the allegation and proof of an absence of meaningful choice.

47. CAL. COMMERCIAL CODE § 2302 (West 1964). North Carolina originally deleted § 2-302 from its version of the UCC. N. CAR. GEN. STAT. § 25-2-302 (1965); Clifford, *Article Two: Sales*, 44 N. CAR. L. REV. 539, 562-64 (1966). In 1971, North Carolina added it back. N. CAR. GEN. STAT. § 25-2-302 (Supp. 1971). Louisiana has not enacted the Code. All other states and the District of Columbia have § 2-302.

48. California State Bar Committee on the Commercial Code, A Special Report, *The Uniform Commercial Code*, 37 CAL. B. J. 117, 135-36 (1962). § 2-302 was defended on the ground that form contracts were not negotiated in any real sense and therefore the courts must have the power to prevent the merchant from overreaching when dealing with a consumer who has neither the knowledge nor the bargaining position to influence the contract terms. *Id.* at 135. A compromise to place some limitations on the court's power by requiring the contract to be a form contract and by excluding the "between merchants" situations (since they presumably are of more equal bargaining power) failed. See CAL. COMMERCIAL CODE § 2302, Cal. Code Comment at 197-98 (West 1964); Project, *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code*, 10 U.C.L.A. L. REV. 1087, 1130-32 (1963).

49. *Swanson v. Hempstead*, 64 Cal. App. 2d 681, 149 P.2d 404, 407-08 (1964) (the evidence did not justify a finding that the attorney's contingent fee contract was unconscionable); *accord*, *Setzer v. Robinson*, 57 Cal. 2d 213, 368 P.2d 124, 18 Cal. Rptr. 524, 527 (1962); *Youngblood v.*



While the legislature has expressly excluded 2-302, the fears that premised its exclusion have not proven correct. The courts in other states have not run roughshod over negotiated contract rights. This, then, would give the courts some leeway to continue to follow their common law unconscionability doctrine. In addition, there seems to be no reason why the courts could not pattern their common law unconscionability doctrine after that emanating from 2-302. *Williams v. Walker-Thomas Furniture Co.*, the leading case in the area, was itself a pre-Code common law unconscionability case.<sup>50</sup> The impact of the existence of the doctrine, while not dramatic under the restrictive *Walker-Thomas* formulation, would be something that could be useful to the consumer, at least in limited cases.

Besides this frontal attempt to incorporate 2-302 into California law, there are more subtle approaches. For example, California courts have, by construction and interpretation of contract terms, avoided enforcement of harsh bargains.<sup>51</sup> They also have manipulated the rules of offer, acceptance and consideration to reach pro-consumer results.<sup>52</sup> Another approach is the recognition of unconscionability as an aspect of good faith -- a concept that has not been deleted in California and

---

Higgins, 146 Cal. App. 2d 350, 303 P.2d 637, 639 (1956). The *Swanson* case defined an "unconscionable contract" as one "such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." *Swanson v. Hempstead*, 64 Cal. App. 2d 681, 149 P.2d 404, 407 (1964). Authority exists for the premise that § 2-302 codifies the common law doctrine of unconscionability. *In re Jackson*, Bankruptcy No. 40666, 9 UCC REP. SERV. (W.D. Mo. 1971); *American Home Improvement, Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964) (construction contract); *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405, 418 (1967).

50. Although the Code (including § 2-302) had been adopted in the District of Columbia at the time of litigation, it was not enacted until after *Williams* had contracted. This, the time of contracting, was the critical time for determining whether the Code applied. Therefore the Code did not control the decision. The *Walker-Thomas* court looked to legislative history (i.e., Congress' enactment of the Code and § 2-302) and held that this was the way it ought, at common law, to be. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

51. *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041, 1047 (1954) (strict construction of a disclaimer of an implied warranty of merchantable quality).

52. E.g., *Monarco v. Lo Greco*, 35 Cal. 2d 621, 220 P.2d 737 (1950) (estoppel); *State Fin. Co. v. Smith*, 44 Cal. App. 2d 688, 112 P.2d 901 (1941) (gross inequality of consideration was evidence of fraud). Corbin stated:

There is sufficient flexibility in the concepts of fraud, duress, misrepresentation, and undue influence, not to mention differences in economic bargaining power, to enable the courts to avoid enforcement of a bargain that is shown to be unconscionable by reason of gross inadequacy of consideration accompanied by other relevant factors. 1 A. CORBIN, CONTRACTS § 128 (1963). (footnote omitted)



which underpins the entire Code.<sup>53</sup> While achieving results by direction rather than by indirection is desirable, the legislature's rejection of 2-302 has left the consumer and the courts with little alternative.<sup>54</sup>

### CONCLUSION

The consumer-merchant relationship in the sale of goods area has not been greatly affected by 2-302. Only a few reported cases illustrate that the consumer has been benefited by 2-302. Unconscionability, under the *Walker-Thomas* formulation, works little magic for the consumer. The Comment 1 formulation, while appearing to be more readily available to the consumer, may in fact contain (although not verbalized) the same considerations as those found in *Walker-Thomas*. On the other hand, unconscionability does play an important role in those cases which do not fit the established doctrine -- such as fraud, duress and usury -- but which are still so oppressive as to shock the conscience of the court.

One final point needs some reflection. For a consumer who can establish that the contract or clause was unconscionable at the time of contracting, some care must be taken in selecting his remedy. For example, where the price term is unconscionable, does the consumer want

---

53. For a discussion of good faith, see note 35 *supra*. An unconscionable contract is inconsistent with good faith. *In re Jackson*, Bankruptcy No. 40666, 9 UCC REP. SERV. 1152, 1158 (W.D. Mo. 1971). "While the unconscionability referred to in § 2-302 may be conduct worse in some degree than the lack of good faith prohibited by § 1-203, both impose the same basic obligations of fair dealing in commercial transactions." *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397, 401 (1971).

California has not deleted all reference to unconscionability. See CAL. COMMERCIAL CODE § 2719(3) (West 1964).

54. See CAL. COMMERCIAL CODE § 2302, Cal. Code Comment 197 (West 1964). For further details concerning California, see Comment, *A Reevaluation of the Decision Not To Adopt the Unconscionability Provision of the Uniform Commercial Code in California*, 7 SAN DIEGO L. REV. 289 (1970). It should be noted that California does have consumer protection legislation. For a discussion see Project, *Legislative Regulation of Retail Installment Financing*, 7 U.C.L.A. L. REV. 618 (1960).



to return the goods and get his money back, keep the goods and pay what they are worth, or keep the goods and not pay any more (which already may be more than the goods are worth)? Failure to position himself properly before litigation may mean that a finding of unconscionability may not have the potency for the consumer that it could have had. He will not get his full measure of relief.<sup>55</sup>

---

55. In the price cases, if the consumer returns the goods, he may be able to get his money back. On the other hand, if he keeps the goods, he may find himself paying what it was worth or possibly more. This may depend on the amount already paid. For example, in *Frostifresh Corp. v. Reynoso*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967), reversing on the damage issue, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Dist. Ct. 1966), the consumer had paid only the down payment of \$32. He did not attempt to return the refrigerator-freezer. The cost to the merchant was \$348 and the cash sales price was \$900 plus charges bringing the total to \$1145.88. The trial court held the price term unconscionable and gave the merchant judgment for \$348 (his cost) with interest, less the \$32 (paid by consumer). The appeals court reversed the damage issue (still held unconscionable) but permitted the merchant to recover more (merchant should recover his net cost for the appliance plus a reasonable profit, in addition to trucking and service charges necessarily incurred and reasonable finance charges).

In *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct., Nassau County 1969), the consumer did not ask for a set-off and thus paid more for his freezer than did the consumer in *Frostifresh*. The maximum retail value (including a reasonable profit margin) was \$300. The consumer had paid \$619.88 on a contract which called for a cash sales price of \$900 and a total price of \$1234.80. The court said that the merchant had already been amply compensated and reformed the price term to coincide with the amount paid. Should the consumer have been entitled to a refund of \$319.88 (the difference between what he paid and the maximum retail value including a reasonable profit margin) less a reasonable finance charge? The additional amount the consumer paid (\$319) was still more than the entire difference between total price and the cash sales price. Accord, *Toker v. Westerman*, 274 A.2d 78 (N.J. Dist. Ct. 1970); cf. *Urdang v. Muse*, 114 N.J. Super. 372, 276 A.2d 397 (1971).

## THE PONTIAC PROSPECTUS

Arthur Allen Leff\*

I have just, for the first time in eight years, bought a car. It wasn't a particularly ugly experience. I used Consumer Reports, word-of-mouth, pre-bargaining pep talks from my wife, and a great deal of anxiety and time. Maybe I got the right brand and model for my present needs, for about as good a price as I could expect. But I really can't tell; despite my compulsive care I simply could not get enough information to make a fully-educated choice. What I do now know is that the whole process of retail distribution of automobiles in America, upon which a large chunk of this country's retail sales directly or indirectly depend, could be easily, vastly, and inexpensively improved. Carrying out the idea, however, would demand some governmental coercion, and I've spent enough time looking at, say, welfare and public housing, to think that by now such governmental intervention always demands *some* justification, which I will presently try to supply. But let me say first what I think ought to be done, before explaining why.

What I propose is this: Let the government require that there be available each year, no later than the time when the new year's automobiles may be bought by the public, a "Prospectus" setting forth a huge amount of data about every vehicle sold by a particular manufacturer. Whatever this data is (and I'm coming to that), *it should be in such form as to make it easily comparable* with data about other vehicles, both of the same manufacture and others. The Prospectus should be available free in showrooms, and by mail for at most the cost of postage from the manufacturers and an agency of government. They should be so designed that a car shopper can gather a Prospectus from each manufacturer, put them together on the same table, and find data about the same thing on the same page of each.

### I. WHAT THE PROSPECTUS SHOULD CONTAIN

#### A. Mechanical Specifications and Performance Data

What should this Prospectus contain? Some things are easy. First, it should contain the measurable physical and mechanical specifications of the car. That is so easy to do that it's already done by each

---

\* Professor of Law, Yale University. B.A. 1956, Amherst College; LL.B. 1959, Harvard University.

1. An alternative scheme would have all the information gathered in *one* prospectus. But the bulk of information involved, often about alternatives of no real interest to the particular buyer, makes that move ostentatiously unattractive, at least on first shuddering contemplation.



manufacturer, though generally model by model and at levels of completeness varying from the usual back-page box on the "car-in-the-meadow" brochure to Ford's send-for-it-specially big fat book. *Consumer Reports* does it pretty nicely for some proportion of all cars. All that would be necessary to effect this proposed extension would be to pick and standardize the categories and vocabulary of comparison. If the Securities and Exchange Commission can try that for financial statements (a harder job, by the way),<sup>2</sup> our own little "Automotive Marketing Board" (God protect us, I'm pushing another agency) can do it for the physical specs. The information is essentially free; it's a "by-product" of the manufacturing process which is presently thrown away, at least so far as consumers are concerned.<sup>3</sup> But to what may be a large number of consumers more engine-smart than me and my friends, such information could be of critical interest.

Then, of course, there should be performance characteristics. That's harder. A car is what it is. But it is also what it does, and it does so many different things that you can't specify its dynamic reality over the whole spectrum of potential possibility. It stops (or doesn't) on dry pavement and wet, from 60 mph and from 10, with twenty miles on the brakes and with twenty thousand. It corners at various speeds, tucks in at some speeds and out at others, and at still others goes straight through the guard rails. With you in the car it zaps; with you, your kids, and your fat inlaws along, it may yaw and wiggle. All you can do is choose some probabilities out of the welter of infinite possibility and put tested numbers on those. "Fully loaded", "pulling a trailer", and "just the driver" hardly describe all the states of being and becoming, even of a car; and while extrapolating and interpolating may be hazardous, it can't be better to know nothing.<sup>4</sup> If getting this information and standardizing its presentation were difficult and expensive, one might justly howl. But it isn't, so one can't.<sup>5</sup>

---

2. Observe the bulk and complexity of Regulation S-X, governing financial accounting under the various securities acts, 4 CCH FED. SEC. L. REP. ¶ 68,501 *et. seq.*

3. See A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION--THEORY IN USE 308-10 (1969) on joint products with common costs.

4. That is not quite true. There is always the "Theory of the Second Best" which in broadest form "...takes the position that if some of the conditions needed for optimal resource allocation are not being met, one cannot show that meeting the other conditions will be a good thing in terms of resource allocation." G. CALABRESI, THE COSTS OF ACCIDENTS 86 (1970).

That means that an action taken in the right direction is not necessarily the right action to take. For instance, one does not improve his wealth position in swimming from a barren riverbank toward a lush one unless one makes it all the way across. Thus, strictly speaking, it *could* be better to know nothing; it just doesn't seem very likely in this instance.

5. The manufacturers not only do a great deal of product-testing already, they are set up to do a great deal more. Competitors can therefore easily test each other's cars, as well as their own, just to keep each other honest. And if *Consumer Reports* can afford to spot-check cars, the United States government can manage it too. See text at note 15, *infra*.



## B. The "Contract" as a Purchased "Product"

So now we've got some cheap and useful information on the car as a mechanical thing. But it isn't just a car you buy when you trade money and promises to a smiling dealer; it's (not surprisingly) a *deal* that you buy. That little old piece of paper that goes along with the chunk of steel and technology, the "contract" (as it's laughingly labelled), is another purchased *product*. In fact, if one defines a "product" as "an immutable already-made object" and a "contract" as "something created by both the parties", the piece of paper is more a "product" than the car itself, for at least the latter has options.<sup>6</sup> You can, within limits, negotiate the presented reality of the car ("ok, roof frescoes instead of disc brakes"), but if you try to modify any clause in the contract, you have your choice in seller response between giggling incredulity and icy hostility. Well, if it's a *product* you're buying when you "buy" the contract, why not have *those* "specifications" disclosed too -- again in understandable and comparable form.

A typical contract might say:

It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis, or parts furnished hereunder except as follows.

The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within one (1) year after delivery of such vehicle to the original purchaser or before such vehicle has been driven 12,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, *including the implied warranties of merchantability and fitness for a particular purpose* and all other obligations or liabilities on its part.<sup>7</sup>

6. See Leff, *Contract As Thing*, 19 AM. U. L. REV. 131 (1970) for a more extended development of these ideas.

7. The quoted disclaimer is based on the famous one in *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 367, 161 A.2d 69, 74 (1960). It would, by the way, satisfy, at least in form, the requirements of UNIFORM COMMERCIAL CODE § 2-316 on disclaimers of warranty.



Would it be so awful if the booklet said:

If you get problems with the car, for 12,000 miles or one year we'll supply new parts and corkscrew some grudging labor out of your dealer. But *we'll* decide if it's necessary. And if the car cracks up and you get maimed or killed, we're still only responsible for the parts and the labor; don't expect to recover from us for property damage or personal injuries. We suggest you insure yourself, because we sure aren't going to insure you.

Of course, put that way it does look a little nasty. But if that *is* the way it is,<sup>8</sup> and if actually writing down the actual nastiness is too horrifying for the vice-president in charge of sales, he can get the actuality changed rather than the language. He might, for instance, suggest *as a competitive device* changing things so that his company *does* insure you, if only for a year and for a special extra premium. And it would not hurt if the Prospectus demystified a few other "mechanical" aspects of this contract-product. For instance:

You know that bit about "repossession" in the contract? Well, that means that if you miss a payment we can take back the car and resell it, and if we do the chances are that you'll end up without the car, without the money you already paid us, and maybe you'll actually still owe us some.

### C. Pedigree and Track Record

Thus far, our proposed Prospectus has carried current information about the actual car-and-deal being bought. A trickier question involves the relevance of the past. To pick a problem hardly at random, what of defects in, and callbacks of, previous years' models? After all, *you're* buying the current Tyrannosaurus, not last year's. What if all of the earlier model had to be recalled to put the brake pedal into communication with the fluid and shoes? Does that have any bearing on this year's model, in the making of which that *particular* jolly oversight was not indulged?

The question is not, despite my tone, a simple one. It would seem that you could learn what *kind* of outfit a company is by seeing a longer-term pattern; if Company A for the past five years had had callbacks of many more cars with much more serious faults than Company B, it is a natural inference that Company A is a "sloppier company" than B. Certainly the Securities Exchange Commission (SEC) seems to

---

8. With respect to personal injuries, any such language would by now most likely be insufficient to preclude liability in the majority of jurisdictions. See W. PROSSER, *THE LAW OF TORTS* 656-658 (4th ed. 1971). When that is the case, of course, it too ought accurately to be described.



think that a company's last five years' earnings are of justified interest to a securities buyer.<sup>9</sup>

The trouble is, the idea that you can tell about this year by studying the past, no matter how logical it seems, may be twaddle. I have very intelligent colleagues who tell me that reading five-year financials to descry a "trend" is really concealed "chartism", the astrology of financial analysis.<sup>10</sup> Admittedly, a ballplayer who has hit .220 for five seasons is less likely in the sixth suddenly to learn about curve balls; and whatever that tells me about baseball and learning processes carries over, some, into business.

But there may even be an *inverse* relationship between a naughty past and a problematic present. The accumulation of prior failures may eventually stimulate remedial action. 220 hitters eventually get fired. The question is, even assuming that a company with a higher call-back total was less reliable during that period, is it still so today? My inclination would be to include prior call-back information insofar as that data would act as a sanction against loose quality control, but such a sanction may work by fostering irrational factual conclusions, and that makes me exceedingly nervous.

#### D. Sticker Price and Terms

What else should go into the Prospectus? Certainly the sticker price of every car and every option. That would help a lot to cope when faced with the common salesman pitch: "You think that's too high? You think you can't afford \$4600? Tell you what I'm gonna do. I'm going to throw in laser-beam headlights and a spring-gun for your glove compartment (our 'aggression -- defense package') and take out the electrical ego booster, and all for the same price." With the sticker information one would at least have a prayer of figuring out if you were gaining or losing ground. (Of course, you'd know a lot more if you also got the *dealer's* cost for each item, but I see no present reason to give the sellers a corporate coronary by suggesting that.)

---

9. See Item 6 (Summary of Earnings) of Form S-1, the usual form governing the content of Prospectuses distributed pursuant to the Securities Act of 1933.

10. Cf. Fama, *Random Walks in Stock Market Prices*, 21(5) FINANCIAL ANALYSTS J. 55 (Sept.-Oct. 1965), reprinted in V. BRUDNEY & M. CHIRELSTEIN, *CORPORATE FINANCE* 1112 (1972).



### E. Other Things

I suppose I could imagine other cheap and relevant information for this kind of Prospectus,<sup>11</sup> but it seems to me unnecessary to work out further details now. What does seem to me to be critically important to recognize from the beginning is that more information does not necessarily mean a better aggregate message. The danger in mandating a new communications medium is that at any given moment it looks as if every information addition to be carried on that channel has a nearly-nil marginal cost.<sup>12</sup> But, in fact, too much information on a wavelength causes static. The new messages not only fail to get through, but they garble the intelligible and relevant messages already there; and one of the normal results of sensory overload in a commercial context is impulse buying.<sup>13</sup>

Thus it would seem wise to be chary of too much. Specifically, one should stick to the car *as a car* and play down (by exclusion) things like emotional puffery (which by its nature is not set up for comparability anyway) and data about matters like the social, moral and political views of the manufacturers. Arguments in the form of "Don't buy those commie carrots" aren't particularly attractive anyway.<sup>14</sup>

## II. THE PROSPECTUS PRICE TAG; OR, WHAT PRICE KNOWLEDGE?

Much of the beauty of this proposed auto Prospectus requirement lies in its cheapness and cost-effectiveness. The expense of information is a function of the cost of getting it, the cost of rendering it communicable, the cost of disseminating it, and the cost of metering its accuracy. In this case, most of the information will already exist, and will usually already be in communicable and easily comparable form. As I said earlier, the "messages" are cheap because they have for the most part already arisen as "by-products" of the manufacturing and distribution process.

As for printing cost, given all the informationless color gravure car buyers already get, it's hard to weep over requiring a cheaper booklet to sell a large-ticket item like a car. But much more important, the media

---

11. One of my students has indeed explored the question of includable information in greater detail. G. Neigher, *Automobile Merchandizing: Prospects For a Prospectus* (1971). A copy of his unpublished paper is in my possession.

12. See text at note 15, *infra*.

13. See *BEHAVIORAL SCIENCE FOUNDATIONS OF CONSUMER BEHAVIOR* (J. Cohen ed. 1972); and *PERSPECTIVES IN CONSUMER BEHAVIOR* (H. Kassarian & T. Robertson eds. 1968) for collections of recent essays devoted to the complexity of consumer choice, especially its tendency not to be improved as a sole function of information bulk. Cf. note 4, *supra*.

14. See, e.g., Hampden-Turner, *A Proposal For Political Marketing*, 1 *YALE REV. OF L. & SOC. ACTION* 93 (1970) for a typical suggestion that product-purchase decisions take account of the morals of the makers.



channels have already been bought. Having established at great expense all those selling showrooms and already arranged to fill them with "literature", the per unit marginal cost of distributing additional or different information is close to nil. And since, by this distribution technique, the information goes only to those interested in it, it is even better as a cost-benefit matter: this is not like an abortion service advertised in *The Diocesan Weekly*, or even in *Reader's Digest*; this goes right into *Women's Freedom Now*. In brief, it's getting the right channel that costs the most, but once you've bought it, it is very efficient to fill the pipe.

The administration could also be very, very cheap. Our Automotive Marketing Board could be a little teeny agency, having only to set standards of comparability of language and breadth of subject inclusiveness. After all, it's not like the SEC prospectus people trying to cope with every "public" corporation. There are, after all, a maximum of what -- a score of major auto manufacturers worldwide? And, the accuracy of the data furnished is easy to monitor. The agency might do spot checks (the information is pretty objective and the tests replicatable) and so could independent consumers and consumer groups. And most important, *so could and would competitors*.

For once the selling is done on comparative information, everyone is going to try to make sure no one else is fibbing, and in this case *everyone* has the wherewithal to try. Just make the penalty for falsity big and economic -- say, \$1,000,000 per error and the duty to put a corrective label on the prospectus -- and people will be careful. Well-heeled enemies are watching, and they watch hard.

### III. IS THIS TRIP NECESSARY?

Let us then say that this auto prospectus is a feasible proposition, mechanically easy and relatively cheap. Still, why do it? After all, we do have a lot of ugly experience on what happens when the government decides to coerce people to efficiency and/or virtue. Why should it be different in this case?<sup>15</sup>

15. At this point, it might as well be confessed that something similar to the Prospectus (and not really ugly at all) already exists for airplanes. By Federal Regulation, every private plane must come equipped with a little manual filled with details as to both the physical characteristics of the plane and proper operating procedures. See 14 C.F.R. § 23, pts. 18-23 (1972). The pilot is expected to familiarize him or herself with such information before flying the plane. 14 C.F.R. § 91.5(b)(1) (1972). While the ostensible purpose of requiring these manuals is to insure that airplanes, and their passengers, return to earth in substantially the same condition as when they took off, prospective purchasers of aircraft are well advised to consult the manuals for various makes before deciding which one to buy. Not only do the manuals contain information relevant to the buyer, they also demonstrate the feasibility of their contents being regulated by a governmental agency.



As Nader knows (presumably God too), one of the critical pressure points for optimizing the distribution of goods is information. If information is defective, the "market" will be too, even if people can and do act freely and rationally in "buying", and this is true whether the "product" is a washing machine or a president. If the world were gracious enough to accord with even elegant theories about it, the idea of having the government coerce better information would be wholly gratuitous and sublimely insane.

For THE THEORY says that everyone should always be getting about what he wants (within the constraints of his wherewithal). THE MARKET (so the argument goes) will handle it, by facilitating not only the exchange of goods, but the exchange of information too. In this market, as in the political "market", everyone "votes": but the economic voting is with an almost infinitely divisible medium -- money -- that facilitates the expression not merely of preferences, but the intensity of those preferences. If one can make safe goods as cheaply as dangerous ones, one will capture the market by offering more utility for the same outlay. If people will pay extra for safety, they will be serviced. The mechanism is competition: if oaf-like X, a clumsy sort, won't respond to his potential customers' desires for safety and quality, then clever Y will make clear that he will, thereby taking X's customers away and putting X (justly) out of business.

But even if X doesn't go out of business, that's all right too. He may not, after all, be such a clod. His customers may prefer chrome to safety, sexual innuendo to durability. That's not just all right, as THE THEORY has it, that's superkeen. For at the wrist-bone of the whole invisible-hand conception is the ethical belief that a man is entitled to get from it whatever it is *he* wants, be it ("objectively") a pinch or a tickle. The idea is that if everyone's individual desires are satisfied, the result will be the highest valued use of all of the assets of the entire

---

The Federal Aviation Agency requires aircraft manufacturers to include in their "Airplane Flight Manuals", among other things, the following information; airspeed limitations (*i.e.*, how fast the plane can be flown before it will part company with its wings), takeoff weight limitations (including temperature and altitude factors) and the methods used by the manufacturer in obtaining such information, climb and landing configurations and performance figures, proper operating procedures, explanations of "significant or unusual flight or ground handling characteristics" (one might hesitate to think what *that* could involve), and the location of the plane's center of gravity (so that it can be properly balanced when loaded). Certain emergency procedures are also included in the manuals, such as how to restart turbine engines in flight, and, one might suppose, how to affix a spare propeller at 15,000 feet. Airplanes are even required to provide a space, accessible to the pilot, in which the manual can be stowed. 42 C.F.R. §§ 23 (pts. 18-23), 23.1581 - 89 (1972).

All of the required information can be neatly tucked into a surprisingly compact booklet (available from dealers and also from rental agencies, who prefer that renters bring their planes back as intact as possible). Aircraft manufacturers like to see people with copies of these booklets because they make for safer flying, and also because the manufacturers could conceivably be held civilly liable for failure to warn users of the airplane adequately as to its potential hazards. See L.S. KREINDLER, AVIATION ACCIDENT LAW, pt. 1, § 7.01, 7.02(3), and 7.02(4) (1972).



community. That's known as "Pareto optimality",<sup>16</sup> and for many economists that's a situation right up there with God and country, and considerably ahead of Yale.

But information, of course, is not a free good. Nothing is. Someone will have to pay to produce and distribute it, and no one is crazy enough to pay for perfection in that or any other product. That still does not mean the market mechanism could not, in theory, cope with information production problems. If you make a car that goes from 0-60 in eight seconds and back again in four (in both cases without killing the driver), lasts seventeen years, produces a pretty fair orgasm (whether you have a passenger or not), includes in its warranty total protection against all the small disappointments of life, keeps you safe in head-ons with cement trucks, and costs about as much as a steam iron, you are competitively impelled to get the word across. You are even impelled, if necessary, to bad-mouth your competitor's 8-cylinder feh.

But the fact that information can be seen as a market commodity also implies that it is subject, like any other, to market failure.<sup>17</sup> And indeed, there are reasons why the supply of information is not optimized, even in a market unconstrained by regulation. First of all, ones competitive product advantage is rarely as mouth-watering as the one described above. The discriminations you will have to make *and then convey* are likely to be demanding of far subtler selling speech. This is especially so because the nice things about a product tend to be contradictory: great heavy lunkers of sheet steel off of which large meteorites bounce do not go so easily from 0 to 60; and if they do, they get about two miles per gallon. Thus, to advertise an advantage is frequently to give screaming currency to a disadvantage.<sup>18</sup> And if your actual advantages (and disadvantages) are slight (and that is likely, for there are good technological reasons why the gap between competitive products tends to be undramatic), it is hard to get *any* impact for them. So it's 0 to 60 in 10 seconds rather than 12. So your warranty covers rubber

16. See, e.g., Bator, *The Simple Analytics of Welfare Maximization*, 47 AMER. ECON. REV. 22 (1957).

17. See, e.g., Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351 (1958), reprinted in, READINGS IN MICROECONOMICS 457 (W. Breit & H. Hochman eds. 1968).

18. This is particularly dramatic when there is one body of information about a good without close substitutes which is incandescently unpleasant to all producers thereof, e.g., the cunning little extra costs of cigarette smoking. See R. WINTER, JR., THE CONSUMER ADVOCATE VERSUS THE CONSUMER 12-13 (1972).

The obverse situation involves information which benefits one's competitors as much as oneself. It is hard to get a property interest in information. Thus one is insufficiently motivated to create "public goods" at one's own expense if everyone gets the whole benefit of it along with you. See A. ALCHIAN & W. ALLEN, *op. cit. supra*, note 3, at 164-165, 251-53. It is arguable, for instance, that there would be more safe-driving information produced if there were only one liability insurer.



parts as well as power trains. So what? -- especially if the extra goodies cost extra.

Then there is the cost-of-learning problem.<sup>19</sup> If one buys an automobile whose steering wheel is given to casual driver-evisceration, one *will* learn. "I'm not going to buy *that* model again," say you, trying neatly to refold and repack the last 17 feet of disheveled intestine. "If those guys at Pterodactyl Motors aren't going to level with me, that's the last time they see any of *my* money." Well, I suppose so, but that's a pretty expensive bit of information to shove into your personal computer for future reference. And though there are mechanisms beside the market (warranty and tort law, for instance) which theoretically should change the ultimate nesting place of that little information cost, they have their own complexities, costs, and risks.<sup>20</sup>

In addition, there are the time-lag and "research" problems. As a long-run competitive device, lying is most likely a bad idea. But not all competition has as its most significant span any particularly long run. The word that Hymie spits in his pickles might do in Hymie in favor of Moe, even if Moe is actually the one who does the spitting and the lying. More than that, even if Moe spits but doesn't lie, how is Hymie to get at Moe's barrel to know? Moe has an interest in keeping Hymie from knowing that particular bacillus count. Fraud *doth* often prosper, and over a long enough time-span to justify the existence of fraud law.

But most important, Moe has a strong interest in preventing Hymie from coming up with a way to present his information *in comparable form*. When it comes to commerce, it is mostly the symbols we manipulate, not the things themselves. The things are eventually shipped out and variously transferred, but the *deals* are mostly over the labels. Those labels, however, aren't worth a damn unless one can *compare* their messages. A badly situated seller has no interest in making telling comparisons easy for his competitors; and it's not easy for his competitors (who are, after all, each other's competitors too, and who in addition have anti-trust laws to sweat about) to agree and combine on an informational matrix that they can impose on him. That is, what one needs is a stabilized comparable vocabulary, *and even a reasonably competitive market may not be able to supply it*. Even in the absence of "monopoly" it may be more efficient to allow the government, as grand lexicographer, to supply the vocabulary of comparison and impose it on the market.<sup>21</sup> Indeed, the most unambiguously successful "consumer

19. Cf. R. WINTER, JR., *op cit. supra*. note 18, at 12.

20. See G. CALABRESI, *op. cit. supra*. note 4, *passim*.

21. Let me emphasize here that I am *not* justifying this proposed governmental incursion into information marketing on the ground that the auto companies form a "shared monopoly" or "oligopoly." It can be argued that since monopolists tend to restrict production of goods, and



protection" job ever done by government was its mandatory standardization, from a very early period, of labels for weights, measures and quantities; it is, after all, very tempting as a short-run competitive device to sell eleven-ounce "pounds".

#### IV. PROSPECTUS PERSPECTIVE

Now, there are at least two things that should not be adduced from the above. The first is the fantasy (as bizarre as the perfect-market one) that the market doesn't work at all; either in general, or specifically with respect to information. Without my wanting to get into a screaming match with anyone, I suggest that it works pretty well, especially considering the alternatives. The second unwarranted belief is that since it works pretty well, it *has* to work worse if the government meddles with it. It frequently turns out this way, but sometimes it doesn't. After all, the market imperfecting mechanisms described above are so common in practical economic thought that they all even have pet names, like "externality", "free-rider", "public goods under-investment", and "hold-out".<sup>22</sup> What I'm asking is this: If, as I suspect the case is here, the costs of all shapes of government intervention -- direct, bureaucratic, political, and spiritual -- are less than the value of repairing the market mechanism, then why not make the necessary repairs?

For it might even work. -- Not to make cars, or the process of shopping for them, "perfect" (whatever that might mean), but at a very low cost (economic, psychic, and political) to make it very much *more* nearly perfect in getting people what they want. This will not stop them from wanting what you or I or Ralph Nader think they ought not to want, but that really isn't so terrible. For a government to try to design high-quality information is much cheaper than its trying to design high-quality goods, and much better than its trying to design high-quality people.

---

information is a good, oligopolists will also tend to restrict production of goods, including information, and that this suboptimal production requires governmental repair. The trouble with the argument is (a) monopolists don't always restrict production in order to maximize; (b) oligopolists are not monopolists. Thus we have really no idea what their information-production function is.

More important, however, I do not rely on any oligopoly theory to justify this lexicographic governmental role because I think it is as much needed in competitive industries as in concentrated ones. Indeed it can be argued that it is more needed the less concentrated the industry. A few firms would seem to have less trouble, *i.e.*, lower transaction costs, than many firms in reaching a standardized linguistic product, because of their greater ease of collusion, and of their greater probability of each guessing what each of the others would guess. See A. RAPOPORT, *FIGHTS, GAMES, AND DEBATES* 213-25 (1960). One might, in fact, fairly describe my proposal as a suggestion that the government create and coordinate a limited cartel in the production of certain standardized commercial language. But then again, isn't the creation and coordination of cartels what regulatory agencies are all and always about? See, *e.g.*, Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959).

22. See Bator, *op. cit. supra*, note 14.



Page 36  
(Blank)



# THE PERSONAL INFORMATION MARKET:

## *An Examination of the Scope and Impact of the Fair Credit Reporting Act*

Albert A. Foer\*

### PREFACE

The literature of privacy was born in an 1890 Harvard Law Review article by Warren and Brandeis.<sup>1</sup> For three-quarters of a century it led a modest existence, characterized by a focus on the legal status of the evolving tort of invasion of privacy.<sup>2</sup> In the middle 1960's, however, the production of privacy literature entered a take-off stage. Fuelled by concern for the potential uses of computer technology and a dramatic, if not apocalyptic, awareness of the approaching Orwellian deadline, the new generation of privacy writers took aim on all manner of privacy intrusions, from wiretaps to census forms, lie detectors to computer data banks, junk mail to credit investigations. Much of the writing was marked more by an unsystematic and heated concern with the various manifestations of the "assault on privacy" than by dispassionate analysis of the complex public policy problems involved in shaping institutions to protect privacy.<sup>4</sup> Despite the literary clanging of alarms, the only federal legislation to emerge with the specific purpose of protecting privacy has been the Fair Credit Reporting Act (FCRA).<sup>5</sup>

Dissatisfied with the rather cosmic style of the new privacy literature and hoping that a systematic empirical analysis of one area of the assault on privacy would yield workable leads for privacy protection legislation, the author approached the American Bar Foundation with a proposal to study the personal information market in Chicago, in order to evaluate the impact of the FCRA. A small grant was arranged to cover the costs of information gathering.<sup>6</sup>

---

\* A.B., Brandeis University, 1966;  
M.A., Washington University, 1967;  
J.D., University of Chicago, 1973.

1. *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. See, e.g., Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

3. See, e.g., V. PACKARD, *THE NAKED SOCIETY* (1964); A. WESTIN, *PRIVACY AND FREEDOM* (1967); and A. MILLER, *THE ASSAULT ON PRIVACY* (1971).

4. But see the highly specific essays collected by Stanton Wheeler in *ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE* (1969). Professor Westin's forthcoming *DATA BANKS IN A FREE SOCIETY* promises to add a new scientific dimension to privacy literature.

5. Title VI of Pub. L. 91-508; 84 Stat. 1127; Codified at 15 U.S.C. § 1681 (1970); [Hereinafter referred to as the FCRA].

6. The analyses, conclusions, and opinions expressed are those of the author and not those of the Foundation, its officers, directors or others associated with its work. A description of the Author's methodology and approach in researching this project may be found in Appendix Ten.



The personal information market may be defined as an area of the private sector of the economy within which financial, public record, and reputational information about identifiable individuals is gathered and disseminated on a regular basis for purposes of commercially-related decision-making. The market includes credit bureaus, insurance inspection bureaus, insurance claims investigators, detective agencies, executive search organizations,<sup>7</sup> mail list brokers,<sup>8</sup> income tax preparation firms,<sup>9</sup> intercompany data banks used by insurance companies,<sup>10</sup> and perhaps others.<sup>11</sup> The primary users of the personal information provided by these agencies are insurance companies, retailers, financial institutions (including finance companies and small loan companies), employers, landlords, and government agencies. Many of these entities were consulted during the course of the study, but because the FCRA was directed primarily at credit bureaus and inspection bureaus, these were the primary subjects of study in this article.

The Fair Credit Reporting Act went into effect in April, 1971. In essence, it provides that when a consumer is denied credit, insurance, or employment in whole or in part because of information in a consumer report, the user of the consumer report must inform the consumer of this fact, and must provide the consumer with the name and address of the consumer reporting agency which furnished the report. The consumer (whether or not adverse action was taken against him) has the right to obtain disclosure of the substance of the information in the reporting agency's file. If he takes issue with the information, the agency must reinvestigate and make any indicated changes. There are other aspects to the FCRA dealing with permissible purposes of reports, investigative consumer reports, obsolete information, and confidentiality. These will be introduced at a later point. Two definitions are of particular importance:

The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly

---

7. E.g., Heidrick & Struggles, profiled in Appendix One.

8. Direct mail list brokers have lists which may include information on the publications an individual reads, the charities to which he contributes, candidates he supports financially, and his stand on political issues. CONGRESSIONAL QUARTERLY, DOLLAR POLITICS 5 (1971). See Comment, *Commercial Information Brokers*, 4 COLUM. HUMAN RIGHTS L. REV. 203,212 (1972).

9. The FTC alleged in 1971 that data obtained for tax returns was given by H & R Block to a wholly-owned subsidiary which compiled mailing lists. Comment, *Commercial Information Brokers*, 4 COLUM. HUMAN RIGHTS L. REV. 203,216 (1972).

10. E.g., the Medical Information Bureau, described below in text at note 138.

11. E.g., two organizations headquartered in the Chicago area, The American Security Council and the Church League of America, are reported to maintain files on "peaceniks, draft-card burners, pseudo-intellectuals," and other troublesome individuals, which are allegedly at the service of corporate hiring executives. AFL-CIO MARITIME TRADES DEPT., CREDIT BUREAUS: A PRIVATE INTELLIGENCE NETWORK 33-34 (1971). Both organizations deny that they are presently engaged in the alleged activities.



engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.<sup>12</sup>

This leads, in what will be seen to be circular fashion, to the statutory definition of "consumer report," which means,

...any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604.<sup>13</sup>

In context, section 604 can be read to include the purpose of the government in determining the consumer's eligibility for a license or other benefit where the law requires that an applicant's financial responsibility or status be considered, and the purpose of anyone with a "legitimate business need" for the information in connection with a business transaction involving the consumer.

A thorough study of the flow of personal information within a single community or the nation at large has yet to be made. Even with the results of the project here reported, only an educated guess can be made as to the amount of consumer reporting taking place in Chicago (where most of the research for this project was conducted). The author's best estimate of the number of files kept by the approximately 20 credit bureaus serving the 6.7 million population of the Chicago, Illinois/Northwestern Indiana Urbanized Area is 20 million. This does not imply that 20 million individuals are on file in credit bureaus; there is obviously much overlap, and the same individual may be covered by 5 or more credit bureaus.<sup>14</sup> Moreover, some of these files go back many

12. FCRA, *supra* note 5, § 603(f).

13. FCRA, *supra* note 5, § 603(d). The statutory definition also includes three exceptions, not important at this point.

14. Obviously some people are more likely to have files in credit bureaus than others. For example, in 1970, 49% of American families had installment debts outstanding. G. LATONA, L. MANDELL, & J. SCHMIEDESKAMP, 1970 SURVEY OF CONSUMER FINANCES, 21. Credit cards are used by 50% of American families. *Id.* at 32. Mortgages were held by 58% of all non-farm homeowners. *Id.* at 44, and in 1969 approximately 5% of non-farm families bought new or used houses for their occupancy, 87% of which incurred mortgages. *Id.* at 35. All of these families would be represented in the credit bureaus; but to what extent to the various groups overlap? The 6.7 million population figure is taken from the U.S. Bureau of the Census, 1970 CENSUS



years, and relate to individuals who no longer live in the area. The author estimates the number of credit reports covered by the FCRA, sold in 1972 in the same area, to be 7 million.

As for insurance inspections and employment investigations undertaken by the inspection bureaus, approximately 700,000 were made in 1972 in the Chicago, Illinois/Northwestern Indiana Urbanized Area.<sup>15</sup> It must be noted that some of these inspections are relatively abbreviated and do not involve street investigations, some are made on commercial enterprises rather than individuals, and some individuals are inspected more than once during a year because they apply for more than one type of insurance. Taking these factors into account, a rough estimate of the number of individuals actually investigated in 1972 by insurance inspectors in the Chicago area is about 400,000.<sup>16</sup>

These figures -- 400,000 individuals investigated and 7 million credit bureau reports prepared in a single metropolitan area in a single year -- do not imply very much in themselves about the threat to privacy. Because nearly all consumer reports (with some exceptions in the personnel reporting area) are initiated by an individual's application for some benefit, it can be assumed that most individuals are at least vaguely aware that they are reported on. Whether they are sensitive to the nature and quantity of reporting affecting their lives, however, remains an open question. Despite the fact that so many Americans are profiled, and their records bought and sold, the personal information market has barely been touched by researchers.

This article begins with a description of the market, giving both a national overview and a more specific view of the market in the single metropolis of Chicago. In a second section, the effectiveness of the FCRA is evaluated in terms of the law's ability to cope with seven particular abuses which Congress found to be present in the personal information market prior to passage of the FCRA. A final section sets out and weighs various suggested strategies for reform.

---

OF THE POPULATION, (Illinois) 15-33. Area includes parts of Cook, Du Page, Lake and Will Counties in Illinois and parts of Lake and Porter Counties in Indiana.

---

15. This figure is obtained by approximating the number of full-time inspectors working in the area (including 20% of part-time inspectors), 215, and multiplying by an average of 15 reports a day (a conservative figure), 5 days a week, 50 weeks a year.

16. Retail Credit Co., the largest inspection bureau in Chicago and the nation, retains 400,000 files in Chicago, even though the majority of files are destroyed 13 months after an investigation. Interview with T. Linnen, Manager-Operations, Retail Credit Co., Chicago, Jan. 20, 1972. Retail Credit Co. allegedly reported on 750,000 people in Los Angeles in 1971. Auerbach, *Credit Probers*, Los Angeles Times, Aug. 22, 1972 at 1, col. 1. Nationally, Retail Credit produced approximately 40 million reports in 1970. Listing Application A-30695 to New York Stock Exchange, Inc., Mar. 1, 1971.



## I. A PROFILE OF THE PERSONAL INFORMATION MARKET

### A. DIRECT REPORTING

The most frequent type of communication to be found in the personal information market is the so-called *direct report*,<sup>17</sup> which is also referred to as a *report of ledger experience*. The direct report is exemplified by the response of a retailer when a local banker telephones him for information about one of his customers, or when a potential employer asks a former employer about his experience with a present job applicant. The essential element of the direct report is that the person giving information has had dealings with the person reported on; there is no intermediary. A direct report will rarely be made unless the subject of the report has initiated matters by seeking a benefit from a decision-maker. Indeed, the direct reporter is usually identified for the decision-maker by the subject himself.

For the most part, direct reporting is handled in an informal manner, although where large numbers of reports are involved, special internal systems may be established.<sup>18</sup> Most direct inquiries are made by telephone. Identification procedures are uneven, with the majority of direct reporters apparently willing to respond to any telephone inquiry which appears on the surface to be legitimate. Records of direct inquiries and responses are rarely maintained.<sup>19</sup>

The most frequent use of direct reports appears to be for the purpose of learning whether a customer has an account with a particular creditor and if that customer pays his bills on time. A second important use is for verification of employment<sup>20</sup> or to obtain a former employer's evaluation of a present employment applicant. Among the major users of direct reports are credit bureaus (defined and discussed below),<sup>21</sup>

---

17. Approximately 75% of credit grantors use credit bureaus in order to evaluate applications. 81% make their own direct inquiries, either to supplement the credit bureau report or in place of such a report. Credit grantors with larger numbers of applications have a greater tendency to rely on direct checking in addition to credit bureau reporting. ASSOCIATED CREDIT BUREAUS, INC., ATTITUDES OF LOCAL CREDIT GRANTERS TOWARD ACB MEMBER SERVICES, 1, 3 (1971).

18. E.g., a Chicago appliance discount chain with 20 stores has 8 employees whose full-time occupation is to answer the 1,500 to 2,000 direct inquiries received each week.

19. Information supplied by consumer report users supports a point made by Michael Baker in *Record Privacy as a Marginal Problem: The Limits of Consciousness and Concern*, 4 COLUM. HUMAN RIGHTS L. REV. 88, 91 (1972): "[R]ecord-keeping is a means for most organizations and in some respects goes on in the background of the organization's daily activities." As such, Baker says, much of the record-keeping which affects individuals goes on in the background of social life and is of low visibility to the individuals concerned.

20. To reduce the amount of time consumed in the verification of employment, centralized repositories sometimes exist. See the profile of The Consolidated Employee Index in Appendix One.

21. One respondent, a medium-sized womens wear shop in Chicago which handles about 20 direct inquiries per month, estimates the sources of inquiry to be: credit bureaus, 25%; small retailers, 25%; finance companies, 50%. Other respondents state that they receive many inquiries from banks, as well.



which often need to up-date information for supplementation of what is already on file. In fact, the primary source of credit bureau information can be said to be direct reports, since most subscribers to credit bureaus are contractually bound to transmit their credit accounts periodically to the bureau.

Until the FCRA, the content of a direct report was limited only by the sense of propriety of the reporter. The FCRA, however, has had an indirect impact upon content. The term "consumer report" was defined in the FCRA to exclude "any report containing information solely as to transactions or experiences between the consumer and the person making the report." "This exception," advises the Federal Trade Commission (FTC) staff, "was designed to cover so-called trade experience furnished by a creditor to other creditors of the consumer. It also covers verification of past and present employers, salary, and other items included by the consumer on his application for credit."<sup>22</sup>

To report hearsay information regularly would bring the direct reporter under the definition of a consumer reporting agency. This would be undesirable for one not in the full-time business of consumer reporting,<sup>23</sup> and, consequently, most companies which give direct reports on request are now taking care to limit the information they furnish.

It is difficult to believe that a direct reporter would be prosecuted for failing to comply with the FCRA. The informal nature of this kind of information exchange does not leave enough tracks<sup>24</sup> for the FTC or an injured consumer to build the evidence necessary to prove that the direct reporter "regularly engages" in the practice of assembling or evaluating information on consumers "for the purpose of furnishing consumer reports to third parties."<sup>25</sup>

---

22. 4 CCH CONSUMER CREDIT GUIDE ¶ 11,312 at 59,804. [Hereinafter, CCH CCG.]

23. The consequences of being classified as a consumer reporting agency include: being permitted to provide consumer reports only under specified circumstances; having to disclose reports and other file data to any file subject; having to re-investigate in case of disputed information; civil liability for willful or negligent noncompliance with the FCRA; and criminal sanctions for unauthorized disclosures of information.

24. Under FCRA, *supra* note 5, § 615(b), when consumer credit is denied or the charge is increased because of information about the consumer obtained in a direct report, the user of the report shall, upon written request by the consumer, disclose the nature of the information to the consumer. The source of the information need not be disclosed. Note also that this requirement of disclosure, minimal as it is, does not apply to direct reports made for insurance, rental, or employment purposes.

25. FCRA, *supra* note 5, § 603(f). The FCRA aside, a consumer who is wrongfully damaged by a direct report may sue the direct reporter for libel, but because of the conditional privilege which exists in most jurisdictions, he would have the difficult task of proving malice to recover. See Ullman, *Liability of Credit Bureaus After the Fair Credit Reporting Act: The Need for Further Reform*, 17 VILL. L. REV. 44 (1971); Comment, *The Future of Common-Law Libel Actions Under the Fair Credit Reporting Act*, 21 CATHOLIC U.L. REV. 201 (1971).



## B. FOUR TYPES OF CREDIT BUREAUS

The word "credit bureau" is often used imprecisely. Sometimes it is confused with "inspection bureau,"<sup>26</sup> possibly because the dominant inspection bureau bears the name Retail Credit Co., which hints of a credit bureau.<sup>27</sup> Credit bureaus tend to have clients who are involved in credit business; inspection bureaus generally work for insurance companies. The main area of overlap involves employment reporting, although here the two types of consumer reporting agencies may be distinguished by their methods of gathering information. Credit bureaus generally rely on their files, supplemented by the telephone and written correspondence. Inspection bureaus tend to use their files only for leads, and build most of their information in personal interviews carried out by investigators. This study will characterize four types of credit bureaus: those which serve a limited purpose, full-service bureaus, credit agencies, and mercantile agencies.<sup>28</sup>

### 1. *Limited-Purpose Credit Bureaus*

Many credit bureaus began life with a limited purpose. For instance, what is now the largest full-service bureau in Chicago began as a formalized exchange of account information by the State Street merchants.<sup>29</sup> TRW Credit Data, which is still classifiable as a limited-purpose operation, may soon qualify as a full-service credit bureau.<sup>30</sup> At present, the bulk of the information TRW supplies is objective trade experience data, turned over to the computer periodically from the accounts of TRW's subscribers. However, as the relatively young TRW Credit Data firm grows it will probably assemble more kinds of information, including public record data, and prepare a greater variety of reports, thereby being able to serve a wider clientele.

A limited-purpose credit bureau is distinguished by the fact that it serves only a particular segment of the commercial community, or serves many segments with only a relatively limited variety of information.

If TRW Credit Data appears to be approaching the border-line of full service, two other credit bureau operations will give a clear idea of

---

26. See Note, *Protecting Privacy in Credit Reporting*, 24 STAN. L. REV. 550 (1972).

27. This is not to suggest that Retail Credit Co. is hiding behind a false name. The company began life as a credit bureau in 1899 in Atlanta, Ga. It moved into inspection work for the insurance companies in 1901. Today it is the owner of the largest chain of credit bureaus in the country, including both full-service bureaus and credit agencies. In the Matter of Retail Credit Co., FTC Proposed Complaint, 3 CCH TRADE REG. REP., § 20,140 (Nov. 13, 1972). Note, this complaint was later issued formally; 3 CCH TRADE REG. REP., § 20,268 (Mar. 9, 1973).

28. General sources on credit bureaus include: ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE, ch. 5 (S. Wheeler, ed., 1969); M. WARNER & M. STONE, THE DATA BANK SOCIETY (1970); J. SHARP, CREDIT REPORTING AND PRIVACY (1970).

29. See Appendix One for profile of the Credit Information Corporation of Chicago.

30. For profile of TRW Credit Data see Appendix One.



what is meant by limited purpose. The Chicago Lenders Exchange<sup>31</sup> serves only the small loan companies of the Chicago area, providing them little more than a listing of other small loan companies with loans outstanding to a particular borrower. The Hooper-Holmes Credit Index<sup>32</sup> serves a broader public, though its subscribers tend to be national firms such as oil companies with credit card programs. The Hooper-Holmes computer contains only what is termed "derogatory" information,<sup>33</sup> mainly records of bad debts, and cannot be used to establish good credit. Businesses with large numbers of credit applications from all over the country use the Hooper-Holmes Index to screen out bad credit risks. Where no information is on file (80 to 85 per cent of the time<sup>34</sup>), the subscriber obtains a standard credit report from a local full-service credit bureau. Both TRW Credit Data and the Hooper-Holmes Credit Index are covered by the FCRA.

Controversy exists, however, as to whether a lenders' exchange should be considered under the statute. Exchanges argue that if an exchange only identifies creditors with whom a consumer has outstanding accounts and the prospective lender then contacts such creditors directly for more detailed information, the lenders exchange is not a consumer reporting agency. The FTC staff takes the position that when a loan exchange furnishes the names of a consumer's current creditors the exchange is making an FCRA consumer report.<sup>35</sup> If the staff interpretation is formally accepted by the Commission, the effect will be to allow consumers who are denied a loan from a small loan company to contact the lenders exchange and learn what is in their file. Since the lenders exchanges commonly have a rule that a member must follow up on information received from the exchange,<sup>36</sup> calling the other loan companies listed, the impact of applying the FCRA to lenders exchanges can be expected to be minimal. Only in the rare case where a consumer is mistakenly listed for outstanding loans and the potential lender is too little interested in placing a loan to attempt to verify the listing will the FCRA be utilized.

---

31. For profile of the Chicago Lenders Exchange see Appendix One.

32. For profile of the Hooper-Holmes Credit Index, see Appendix One.

33. "Derogatory" is used to indicate that the data bank carries only negative types of information. The information itself is of an objective nature. Whether information is meaningfully derogatory, of course, depends upon the evaluation of the decision-maker. In some credit situations neutral information, such as length of employment, may be weighed against the applicant. On the other hand, information that a consumer has recently been through bankruptcy proceedings is considered positive by some creditors, because of the guarantee against further bankruptcy for six years.

34. Interview with E. William Carney, Regional Manager, Hooper-Holmes Credit Index, Chicago, Jan. 28, 1972.

35. FTC News Release, June 16, 1972.

36. Interview (telephone) with R.W. Hahne, President, Chicago Lenders Exchange, Chicago, Jan. 26, 1972.



## 2. Full-Service Credit Bureaus

The full-service credit bureau serves the entire consumer credit community and provides a wider range of information than the limited-purpose bureaus. In addition to trade experience data, filed information usually includes material culled from public records and newspapers. Reports may include reputational information occasionally, but this will normally be obtained by use of the telephone or mail and will not entail street investigations.

Some full-service bureaus have debt collection divisions<sup>37</sup> and "welcome wagon" operations<sup>38</sup>; some publish credit guides and protective bulletins.<sup>39</sup> While the schedule of reporting services and prices of a particular credit bureau may list as many as 14 distinct services,<sup>40</sup> credit bureau reports generally fall into four fairly well-defined categories:

a. *Consumer credit.* The simple "credit report," or "in-file clearance," contains trade experience information obtained from the bureau's subscribers, plus public record information. Besides court records and newspaper clippings, some credit bureaus (and inspection bureaus) include criminal record and arrest record information obtained informally from police sources.<sup>41</sup> A "developed" report might also include employment verification and a telephone check to assure that all information is up-to-date.

37. Only two credit bureaus in Chicago have collection departments, but the national figure is 43%. *The Credit Industry, Hearings Before the Subcommittee on Antitrust and Monopoly, Committee of the Judiciary, U.S. Senate, 90th Cong., 2d Sess. 45 (1968) [henceforth, Hart Hgs.]*. For incisive testimony concerning abuses in the credit bureau - debt collection tandem, see *Fair Credit Reporting, Hearing Before the Subcommittee on Consumer Affairs, Committee on Banking and Currency on H.R. 16340, 91st Cong., 2d Sess. 303 (1970) [henceforth, Sullivan Hgs.]*.

38. Over 30% of credit grantors, nationally, utilize newcomer services. ACB, note 17 *supra*, at 7. The idea of a welcome wagon service seems to be twofold. The neighborly employee of the service acquaints the newcomer with the local merchants and at the same time makes notes on furnishings, mode of living, and consumer needs, for use by the merchants. N.Y. Times, May 21, 1969, at 68, col. 7. As used herein, the term "welcome wagon" refers generally to the type of service described and does not refer to the company of the same name.

39. The credit guide is usually an alphabetical listing of consumers in the community, with coded ratings. The protective bulletin lists consumers who have issued worthless checks or who for some other reason are not deemed credit worthy, or whose alleged personal characteristics or affiliations disqualify them from employment. Only one such publication was found in the Chicago area, a credit bulletin of the Credit Bureau of East Chicago, Ind. The FTC is expected to issue a formal interpretation of the extent of coverage of these publications under the FCRA. FTC News, Mar. 8, 1972 and June 16, 1972.

40. Credit Information Corporation of Chicago. See Appendix One for profile.

41. Typically, criminal and arrest records were obtained from file girls at Chicago police headquarters for \$2 - \$5. This practice stopped in June, 1972, when the files went on computer; there are not enough people wandering around any more with access to the information. Interview with William Dorf, President, Illinois Service Bureau, Nov. 14, 1972. On the propriety of circulating arrest records, not followed by conviction, see Comment, *Discriminatory Hiring Practices Due to Arrest Records -- Private Remedies*, 17 VILL. L. REV. 110 (1971); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971).



b. *Mortgage*. The "mortgage report", when prepared for the Veterans Administration or the Federal Housing Authority,<sup>42</sup> generally includes information on the potential mortgagor's age, his wife and children, residence, employment, assets, references, and litigation record.<sup>43</sup> Some conventional mortgage reports may go into more personal areas, such as reputation for marital stability. Mortgage reports are also prepared by credit agencies, especially where larger loans are involved.

c. *Tenant*. "Tenant" (or "rental") reports, like others, can be more or less probing, depending upon the needs and pocketbook of the report user. Sometimes a tenant report is nothing more than a consumer credit report, sold to a landlord. Often, however, it includes information gained from previous landlords. The rental report sold by the Credit Information Corporation of Chicago for \$6 includes family status, employment verification, trade clearances, character investigations, previous rental history, and court record review.<sup>44</sup>

d. *Employment*. The "employment" (or "personnel") report also varies according to the practices of the particular bureau and the desires of the particular employer requesting the report. The more thorough employment investigations are usually handled by insurance inspection bureaus, personnel reporting bureaus, or detective agencies. However, for a minimum of \$5, the Chicago Credit Bureau offers a report

designed to furnish information on an individual to determine his or her desirability as an employee. It contains previous employment records, personal history, character, integrity, credit record, and health.<sup>45</sup>

Appendix One provides profiles of many of the full-service credit bureaus operating in metropolitan Chicago. The Chicago area (with two regional full-service credit bureaus, a competitive limited-purpose bureau, and a host of limited-area, full-service credit bureaus specializing in particular suburbs or areas of the city) has more competition than is normal. The national trend of the credit reporting industry is toward control by regional computer centers.<sup>46</sup> Many small credit

42. Interview with Ruth Studer, FHA attorney, Chicago, Feb. 17, 1972.

43. The Schedule of Reporting Services and Prices for the Credit Information Corporation of Chicago lists a conventional mortgage report for \$8, including family status, employment verification, trade clearances, verification of resources, and subject interview. The FHA or VA mortgage report contains the same items, plus a court record review, and sells for \$10.

44. Schedule of Reporting Services and Prices, supplied Nov. 17, 1972.

45. Schedule of Rates and Services, supplied Jan. 19, 1972.

46. D.E. Rutherford, the president of Retail Credit Co.'s credit bureau affiliates, testified in deposition that the automation or computerization of credit files has caused an accelerated rate of



bureaus have been selling out to national corporations which can afford to computerize, and what was once a highly localized industry is beginning to be replaced by a series of national chains owned by large corporations and conglomerates. The largest chain, the 114 credit bureaus owned by Retail Credit Co., is three times larger than any other, but its growth appears to be temporarily halted by a couple of antitrust actions.<sup>47</sup> The credit bureaus are served by one trade association, Associated Credit Bureaus, Inc., which has over 2,000 members.<sup>48</sup>

### 3. Credit Agencies

The third type of credit bureau, called a *credit agency*, is distinguished from the first two types by its emphasis on telephone investigation, rather than reliance on a pre-existing data bank. Several other factors also serve to differentiate the credit agency. For example, where the reports of other credit bureaus are often made orally or in a "common language" coded communication, the credit agency's reports tend to be written out in narrative form. Where the bulk of reports of the limited-purpose and full-service credit bureaus deal with matters of consumer credit, many of the reports of credit agencies pertain to businesses primarily, and to individuals only incidentally. When the credit agencies report on individuals, it is usually in relation to transactions where relatively large amounts of money are involved, such that the credit grantor would not be satisfied with the relatively shallow report of a limited-purpose or full-service bureau.

The major credit agencies in Chicago are Hale-Prietsch, an independent firm which primarily serves banks and savings and loan institutions; and Retailers Commercial Agency, which has offices in over 100 metropolitan areas in the U.S.<sup>49</sup> Retailers Commercial Agency is a wholly-owned subsidiary of Retail Credit Co.

The FCRA does cover credit agency reports on consumers.

---

credit bureau acquisitions. A credit reporting firm owning a computerized facility in a large metropolitan area can secure sufficient credit data in a relatively short time on individuals to serve not only credit grantors doing business within that metropolitan area, but also credit grantors doing business over a wide geographic region surrounding the computerized facility. Fear of the possibility of competition with a regional computer center has led owners of some small credit bureaus to sell out before their investment is actually diminished by such competition. Brief for Plaintiff at 8, *Credit Bureau Reports, Inc. v. Retail Credit Co.*, Civ. Act. 70-H-1157 (S.D. Texas, Houston Div., filed Nov. 5, 1971).

---

47. See text at note 62, *infra*.

48. It is estimated that only 100-150 credit bureaus, many of whom are in small towns, do not belong to the ACB. Testimony of John L. Spafford, Executive Vice-President, ACB, *Fair Credit Reporting, Hearings Before the Subcommittee on Financial Institutions, Committee on Banking and Currency, U.S. Senate*, 91st Cong., 1st Sess. 148 (1969) [henceforth, *Proxmire Hgs.*]. It should also be noted that Retailers Commercial Agency, a subsidiary of Retail Credit Co. with over 100 offices in the U.S., is not a member of the ACB.

49. For profiles of Hale-Prietsch and Retailers Commercial Agency, see Appendix One.



#### 4. Mercantile Agencies

The *mercantile agency*, or *commercial credit bureau*, is primarily engaged in preparing reports on businesses rather than individuals. The largest mercantile agency, in Chicago and nationally, is Dun & Bradstreet.<sup>50</sup> Less than one-half of one percent of Dun & Bradstreet's reports are prepared on consumers, and these are mostly mortgage reports requested by lending institutions. The typical commercial report will contain a limited amount of personal information about individuals, and includes identification of the proprietor, partners, or officers of a business, plus birth date, marital status, education, work history, military service, and public record data.

The extent to which the FCRA covers commercial reports is open to controversy. It is clear from the little legislative history which exists for the FCRA that the law was not intended to regulate business reports.<sup>51</sup> Nonetheless, in one of the few cases decided since the FCRA became effective, a court has held that under sec. 605, pertaining to obsolete data, Dun & Bradstreet was not allowed to report the 20-year old conviction (and subsequent exoneration) of an individual doing business as a corporation.<sup>52</sup>

The question also arises in regard to independent contractors. The advisability of legislating to protect the privacy of individuals reported on during the course of a business investigation cannot be determined without additional information as to the potential commercial advantages and disadvantages. For example, if a mercantile agency could *not* report all information available on an individual doing business as a corporation or an independent contractor, this might disadvantage that individual in competition with other businesses for commercial credit.

#### C. THE NON-LOCAL MARKET

In a mobile society where people often change residences, and where consumers in one city often desire credit from companies located at a distance, it is necessary to have mechanisms for the long-distance communication of credit information. There are in fact four major routes by which a credit grantor in Chicago may obtain information about a consumer who lives now, or formerly lived, in another area:

1. *Direct sales.* The credit grantor could establish his own direct contact with a credit bureau in the consumer's locale. This is somewhat inconvenient, and the credit grantor has to pay a higher rate

---

50. For a profile of Dun & Bradstreet, see Appendix One.

51. S. REP. NO. 91-517, 91st Cong., 1st Sess. 1 (1969). See Comment, *The Fair Credit Reporting Act: Are Business Credit Reports Regulated*, 1971 DUKE L. J. 1229 (1971).

52. *Anonymous v. Dun & Bradstreet*, 40 U.S.L.W. 2162 (N.Y. Sup. Ct., N.Y. City, Sept. 28, 1971).



than would a regular subscriber to the foreign bureau's services. Nevertheless, in 1970, direct sales accounted for about 19 per cent of the \$40 million national non-local credit reporting market.<sup>53</sup>

2. *National network.* The Chicago credit grantor could obtain information through the national networks of such organizations as TRW Credit Data, Hooper-Holmes Credit Index, or the Retail Credit Co.-Retailers Commercial Agency tandem. These accounted for about 30 per cent of the non-local market in 1970.<sup>54</sup>

3. *Brokerage.* The third choice open to the Chicago credit grantor would be to request a local full-service credit bureau to obtain the information for him. This transaction is usually managed through the Interbureau Reporting System of the Associated Credit Bureaus, Inc., which accounted for 7 per cent of the non-local market in 1970.<sup>55</sup> This system operates through pre-purchased inter-bureau coupons which allow credit bureaus to exchange reports without worry about billing procedures or price differentials.<sup>56</sup>

4. *Sales.* Finally, a Chicago credit grantor could purchase a report through Credit Bureau Reports, Inc., a company which sells the reports of over 2,000 local credit bureaus for a commission. CBR's clients tend to be large credit grantors doing business over a wide area, such as oil companies, mail-order houses, and bank charge-card systems, who do not want to deal with hundreds of local credit bureaus having different kinds of reports, different prices, and different billing practices.<sup>57</sup> CBR accounted for nearly 39 per cent of the non-local market in 1970.<sup>58</sup>

Recently, the Associated Credit Bureaus entered the sales field in competition with CBR by setting up Credit Services International to sell to the same companies. When this occurred, CBR sought to move into the interbureau field, announcing that it would provide tickets to the bureaus, instead of coupons, and that these would not have to be pre-purchased.<sup>59</sup> Shortly thereafter, the Justice Department cited the Associated Credit Bureaus, Inc., for violating a 1933 antitrust consent decree<sup>60</sup>

53. Brief for Plaintiff at 52, note 46 *supra*.

54. *Id.* Retail Credit Co. and Retailers Commercial Agency together accounted for about 17%.

*Id.*

55. *Id.*

56. "[I]f an ACB member bureau in Houston needed a report on a Chicago resident, the choice of which Chicago bureau (CIC or CCB) to go to would rest with the Houston manager and . . . by utilizing the coupon system, the Houston bureau would pay the same amount whichever bureau he selected." Letter to U. CHI. L. REV., from D. Barry Connelly, Director of Public Affairs, ACB, Feb. 28, 1972.

57. Brief for Plaintiff at 11, note 46 *supra*.

58. *Id.*, at 52.

59. Telephone interview with Barbara Morris, Office Manager, CBR, Chicago, Jan. 26, 1972.

60. See Weitzman, *The Fair Credit Reporting Act and the NCRA Consent Decree*, 59 CREDIT WORLD 7 (1971).



by requiring its members to use the ACB Interbureau Reporting System exclusively, under threat of expulsion from the trade association.<sup>61</sup>

Meanwhile, Retail Credit Co., which owns 114 credit bureaus in the U.S. and participates in the non-local market through Retailers Commercial Agency, attempted to enter the sales field by creating Credit Marketing Services, Inc. The plan was enjoined for a period of three years when a U.S. District Court found that Retail Credit Co. planned to operate its new subsidiary at an expected loss until it had forced CBR out of the market. The Court also enjoined Retail Credit Co. from acquiring additional credit bureaus for a period of 5 years because, "With an organization like CMS available, it defies common sense to say that RCC-controlled bureaus will depend on any entity other than CMS to reach the non-local credit reporting market."<sup>62</sup> To round out the present picture of the non-local market, it must also be mentioned that the FTC has published a proposed complaint against the Retail Credit Co., alleging in part that Retail Credit Co.'s acquisition of 45 credit bureaus since January, 1970, has lessened effective competition in the non-local market.<sup>63</sup> The FTC is seeking a consent decree which would result in the divestiture of the acquired credit bureaus.<sup>64</sup>

#### D. INSURANCE INSPECTION BUREAUS

To speak of "insurance inspection bureaus" is to adopt the nomenclature of the industry. Historically, the inspection bureaus grew in close alliance with insurance companies, providing the information which underwriters deemed necessary for evaluating insurance risks.<sup>65</sup> But as the general business community's need for personal information grew, some of the larger inspection bureaus branched into employment reporting and other areas of investigation. Retail Credit Co. now has nine distinct lines of informational services: life and health insurance reporting; fire and casualty insurance reporting; personnel reporting; insurance claims investigations; insurance claims adjustments; paramedical services; credit and commercial reporting; audit, inspection, and loss control; and marketing information service.<sup>66</sup>

It is not always easy to distinguish an informational supermarket like Retail Credit Co. from large detective agencies. Retail Credit Co.'s

---

61. Wall Street Journal, Nov. 17, 1971, at 3, col. 2.

62. Credit Bureau Reports, Inc., v. Retail Credit Co., CCH 1972 TRADE CASES, ¶ 73-813, (S.D. Texas, 1971). *Affirmed*, 5 CCH TRADE REG. REP., ¶ 74-450 (April 11, 1973).

63. In the Matter of Retail Credit Co., proposed FTC complaint, *supra* note 27.

64. *Id.*; see Wall Street Journal, Nov. 14, 1972, at 3, col. 2.

65. The only work detailing the history of the inspection industry is W.A. FLINN, HISTORY OF RETAIL CREDIT COMPANY, a 1959 Ph.D. dissertation in economics at Ohio State University, available from University Microfilms, Ann Arbor, Michigan. Flinn's perspective, highly favorable to his subject, does not lead him to consider the company's impact on privacy.

66. RETAIL CREDIT CO. ANNUAL REPORT, 1971 at 8 (1971).



Competitor Index, a confidential internal document, includes analyses of how to sell the company's services in the face of competition from Pinkerton's National Detective Agency, Inc., Wackenhut Corporation, and other detective agencies. The main areas of overlap are claims investigations and personnel reports. Major points for differentiation include: (1) the detective agencies do not engage in insurance inspections; (2) the inspection bureaus do not engage in surveillance in "matrimonial" cases;<sup>67</sup> (3) inspection bureaus place greater emphasis on the creation and use of data banks; and (4) detective agencies are subject to much more state regulation than are inspection bureaus.<sup>68</sup>

Inspection bureaus may be divided into two categories: the nationals and the local independents. The largest national inspection bureaus are Retail Credit Co., Hooper-Holmes Bureau, American Service Bureau, National Inspection Bureau (O'Hanlon's Reports), and Service Review. The Equitable Life Assurance Society of the U.S. is the only insurance company with a fully internal inspection operation. Most insurance companies believe that they will be better served if inspectors are not employed directly by the insurance company. In part, this is because the independent inspector can be more objective in his reports, and in part, it is because of history. Individual insurance companies did not generate enough inspection business to allow them to retain a broad network of inspectors,<sup>69</sup> and by the time most insurance companies had reached a size where they could internalize if they desired, an entrenched inspection industry was already available and adequate.<sup>70</sup>

---

67. "Matrimonial cases" are estimated to account for 40 - 75% of the average private investigator's work. A. WESTIN, *PRIVACY AND FREEDOM* 111 (1967).

68. Retail Credit Co. is registered as a private investigation agency in N.Y., Calif., Conn., Nev., and Fla. Letter from David P. Weinberger, based on a personal survey, to U. CHI. L. REV., April 30, 1972. For denials that Retail Credit Co. is a detective agency, see *Retail Credit Co. of Atlanta, Ga., Hearing Before a Subcommittee of the House Committee on Government Operations*, 90th Cong., 2d Sess. 19 (1968); *Hart Hgs.*, *supra* note 37, at 99; *Proxmire Hgs.*, *supra* note 37, at 180; and *Sullivan Hgs.* *supra* note 37, at 473. It is difficult to understand why some states do not require Retail Credit Co. and other inspection bureaus to register under existing legislation. See ILL. REV. STAT. 1971, ch. 38, §§ 201-1, 201-2, and 201-3, a detective statute which on its face would appear to exempt credit bureaus, but not inspection bureaus. Not only do inspection bureaus report on habits, conduct, associations, reputation and character, for purposes other than describing business or financial standing (as coverage by the Illinois statute would require) but many engage in other traditional detective activities as well. *E.g.*, Retail Credit Co. tracks missing persons: the Veterans Administration estimates that it paid Retail Credit Co. \$57,000 in fiscal 1971 for "skip-locate" reports on persons the VA was unable to locate, where there was a debt in excess of \$300. Letter from Howard M. Denney, Assistant General Counsel, VA, to U. CHI. L. REV., Feb. 17, 1972, reproduced in Appendix Six. It is also clear from Retail Credit Co.'s Manager's Manual that the company's inspectors serve as paid witnesses for insurance companies, based upon knowledge gained in investigations.

69. FLINN, note 65 *supra*, at 133 *et seq.*

70. Equitable Life Assurance Society instituted its inspection system in 1870. FLINN, note 65 *supra*, at 158. Equitable works through a combination of salaried inspectors and part-time correspondents working on a fee basis. Interview (telephone) with Paul Patterson, Regional Inspection Manager, Equitable, Feb. 15, 1972. See Appendix One.



The national inspection bureaus are dominated by Retail Credit Co. In the two major insurance submarkets, life and health insurance reporting and fire and casualty (including automobile) insurance reporting, Retail Credit Co. controls 80 and 50-60 percent of the volume, respectively.<sup>71</sup> The life and health submarket is particularly concentrated: Retail Credit, Hooper-Holmes, and American Service Bureau accounted for 90-95 per cent of the 1970 industry volume of \$55-60 million.<sup>72</sup> The \$120-130 million fire and casualty submarket is somewhat more fragmented, since the leading three firms had only an estimated 60-70 per cent in 1970. The third important submarket in which some of the national inspection bureaus participate, personnel reporting, will be discussed later.<sup>73</sup>

The local independent inspection bureaus, being shut out of the life and health submarket, tend to cluster in the fire and casualty area, reporting on applicants for automobile insurance, fire insurance, and other types of property insurance. Local independents vary in size from one-man out-of-the-basement operations, to fairly sophisticated organizations well able to compete (at least in the fire and casualty field) with the nationals on a local (and in a few cases statewide) basis. Most local independents were formed by inspectors who had received their training from the nationals, and it is understandable that their operations tend to follow the patterns set by the nationals. Unlike the nationals, however, a number of the local independents around the country have formed a trade association, Associated Reporting Companies. To date, the association has produced little in the way of training, marketing, or leadership, and must be considered insignificant.<sup>74</sup>

Appendix One provides profiles of ten inspection bureaus, national and local independents, with offices in Chicago. A fuller discussion of what inspection bureaus do and how they do it occurs in a later section evaluating the impact of the FCRA on investigations.<sup>75</sup>

Inspection bureaus are generally covered by the FCRA's definition of a consumer reporting agency, with the chief exception that reports drawn on businesses are exempt.

---

71. In the Matter of Retail Credit Co., FTC Proposed Complaint, *supra* note 27.

72. *Id.*

73. See text at notes 76 and 233, *infra*.

74. Interview with William Dorf, President, Illinois Service Bureau, Mar. 24, 1972. Members of Associated Reporting Companies in Chicago are Illinois Service Bureau, Jasper's Reports, and Underwriters Reports, Inc. ARCO Directory, 1971.

75. See text at notes 209 *et seq.*, *infra*.



## E. PERSONNEL REPORTING

Personnel reporting is handled by credit bureaus, inspection bureaus, special personnel reporting agencies such as Fidelifacts<sup>76</sup>, detective agencies, and (in relatively small numbers) by executive search organizations. In addition, a substantial proportion of personnel investigating is carried on in-house by employers through their own personnel or security sections.<sup>77</sup> This means that the personnel reporting market is more highly fragmented than the insurance reporting market. Based on its own information and a survey it conducted, Retail Credit Co. estimates that 40 per cent of all employment screening is done by companies' own people and that about 10 per cent of employment applications are simply not inspected. Retail Credit estimates that it received about 20 per cent of such assignments and its competition about 30 per cent.<sup>78</sup> The FTC merely states that Retail Credit is a "leading factor" in the \$25-35 million personnel reporting market.<sup>79</sup>

Coverage of personnel reporting by the FCRA is rather spotty, and will be discussed in detail at a later point.<sup>80</sup>

## II. IMPACT OF THE FCRA

Prior to passage of the Fair Credit Reporting Act, the participants in the personal information market were free of governmental scrutiny. Detective agencies, it is true, were often subject to state regulation, but this was widely believed to be a mere formality.<sup>81</sup> The most important control was the private remedy of a libel action by a damaged consumer; but this was of little practical value because credit reports and inspection reports were traditionally held to be qualifiedly privileged in the public interest of expediting commerce, and the problem of proving malice was so great that reporting agencies had all but an absolute immunity.<sup>82</sup>

In the absence of regulation, a variety of abuses developed, and by the middle and late 1960's critics of the personal information market were calling for reform, in the name of personal privacy.<sup>83</sup> Congressional

76. See profile in Appendix One.

77. See T. WALSH, *SCREENING OF EMPLOYEES IN BUSINESS AND INDUSTRIAL SECURITY: PRACTICAL LEGAL PROBLEMS*, (2d ed., 1972).

78. Plaintiff's Brief at 6, note 46 *supra*.

79. In the Matter of Retail Credit Co., FTC Proposed Complaint, *supra* note 27.

80. See text at note 248 *infra*.

81. See S. DASH, *THE EAVESDROPPERS* (1959), especially pages 216-230, dealing with detective practices in Chicago.

82. Note, *Credit Investigations and the Right of Privacy: Quest for a Remedy*, 57 GEO. L. J. 509, 516 (1959).

83. See the books cited in note 3 *supra*; See also, M. BRENTON, *THE PRIVACY INVADERS* (1964); Michael, *Speculations on the Relation of the Computer to Individual Freedom and the Right of Privacy*, 33 GEO. WASH. L. REV. 270 (1964); Karst, "The Files" *Legal Controls Over*



hearings produced lurid examples of disregard for privacy values,<sup>84</sup> and the pressure for legislation grew so strong that most of the consumer credit industry chose to participate in the legislative drafting rather than stand in opposition.<sup>85</sup>

In the Senate Report for Senator Proxmire's S.823,<sup>86</sup> which with very minimal changes became the Fair Credit Reporting Act, seven aspects of the credit reporting industry were perceived as abuses requiring legislative control. These may be summarized as:

1. The inability of a consumer to know he is being damaged by an adverse report;
2. Difficulty in obtaining access to information in a consumer's file;
3. Obstacles blocking correction of inaccurate information;
4. Failure of consumer reporting agencies to keep information confidential;
5. The reporting of public record information that is out-of-date or incomplete;
6. Unfairness in burdening a consumer for life with a bad credit record if he has later improved his performance; and
7. Intrusions on privacy due to the gathering of highly sensitive and personal information about a person's private life.

To cope with these abuses, Congress passed, and President Nixon signed into law, the Fair Credit Reporting Act. The FCRA has been in effect for more than a year and a half at this writing, and it seems proper at this time, before Congress considers any amendments, to analyze the FCRA in terms of its effectiveness in correcting the perceived abuses.

---

*the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342 (1966); J. SHARP CREDIT REPORTING AND PRIVACY (1970).

---

84. See hearings cited *supra* in notes 37, 48, and 68.

85. See the statements of various industry representatives in *Sullivan Hgs.*, *supra* note 37.

86. S. REP. NO. 91-517, *supra* note 51, accompanying S. 823, 91st Cong., 1st Sess. (1969). S. 823, Senator Proxmire's bill, was approved in the Senate on Nov. 6, 1969 and was sent to the House. It, along with several House bills of similar concern (including its companion bill, H.R. 10,139, and Congresswoman Sullivan's bills, H.R. 16,340 and H.R. 19,403), was hopelessly bottled up in committee and none of these bills was ever voted upon in the House. However, the basic provisions of S. 823 were later attached as a rider to another bill in the Senate which had already passed the House (H.R. 15,073). The conglomerate bill was later approved in Conference Committee, with slight modifications to the credit reporting section, and then passed the House. See Denney, *Federal Fair Credit Reporting Act*, 88 BANKING L. J. 579 (1971); and R. CLONTZ, *FAIR CREDIT REPORTING ACT MANUAL* (1971). Debate on the FCRA was minimal. See 116 CONG. REC. 36569-77 (1970). Senator Proxmire's paternity of the FCRA is memorialized by the consumer reporting agencies in their creation of the verb phrase "to give a Proxmire," which means, to provide a consumer disclosure under the FCRA.



### A. NOTIFICATION

The first problem noted in the Senate Report was that the consumer was often unaware that he was being damaged by an adverse credit report.<sup>87</sup> This resulted, in large part, from the fear of reporting agencies that if their role were known to the public and consumers could learn of the source and content of adverse reports the reporting industry would be deluged by litigation. Standard agreements between credit reporting agencies and their clients prohibited the user from disclosing the contents of a report to the consumer.<sup>88</sup>

Retail Credit Co.'s Manager Manual instructed the inspection bureau manager who received a complaint from a report subject to "Neither deny nor admit making report. . . Draw your caller out, tactfully eliciting information as to source of leak." In case an unfavorable report had been made, the manager was to "[A]void the personal contact, if possible. At any rate, do not commit yourself, the inspector, or the Retail Credit Company."<sup>89</sup> As a result of this attitude of secrecy, an individual could fall into a situation where he wouldn't be able to obtain credit, insurance, or a job--and wouldn't have any way of finding out why.

The FCRA has been successful in remedying this abuse. Under section 615(a), when adverse action is taken against a consumer either wholly or in part because of information in a consumer report, the report user must advise the consumer and supply the name and address of the consumer reporting agency which made the report. Adverse action is defined as the denial to the consumer of credit or insurance for personal, family, or household purposes; or acceptance at an increased, or above standard, charge for credit or insurance; or the denial of employment.<sup>90</sup>

To comply with this provision, consumer report users (informed of their legal obligation in their service contracts with the reporting agencies) generally use form letters to notify consumers when adverse action has been taken.<sup>91</sup> The law does not require that notification be made in writing, however, and some consumer report users, particularly finance companies, prefer to give oral notification.<sup>92</sup>

---

87. S. REP. NO. 91-517, 91st Cong., 1st Sess., at 3 (1969).

88. *Id.*

89. Retail Credit Co. *Manager Manual*, page C-39, dated Oct. 1963, now being revised.

90. FCRA, *supra* note 5, § 615(a).

91. For examples of the form letters used, see Appendix Two.

92. The finance companies interviewed claimed that they prefer to communicate orally with a person who is not granted a loan because this is the best way to smooth ruffled feathers. There is no reason, however, why a consumer report user couldn't supplement a written notification by a friendly oral communication.



A measurement of the effectiveness of the FCRA notification provision may be found in Appendix Three, where figures are given for the number of disclosures of report content to consumers by Chicago area consumer reporting agencies, both before and after passage of the FCRA. As a generalization, it can be said that prior to the FCRA, credit bureaus made some disclosures to consumers, and that the number of disclosures after the effective date of the FCRA multiplied by a factor of from 2 to 20. In the case of the largest credit bureau in Chicago, disclosures are made an average of 4,000 times per month, on a volume of approximately 250,000 reports per month, or of 1 for every 62 reports.<sup>93</sup> Considering that some of the 250,000 reports per month are probably repeats for the same consumer, drawn by different subscribers, one might estimate that about 2 per cent of this credit bureau's report subjects seek disclosures of their files.

The experience of inspection bureaus is somewhat different, because none of the inspection bureaus interviewed made disclosures to consumers prior to the FCRA. Since the FCRA, all have adopted procedures so that consumers can obtain disclosure, but relatively few consumers seem to be taking advantage of these procedures. For instance, the American Service Bureau reports on approximately 112,000 individuals a year, or 9,333 a month, in Chicago; but only 10 to 15 per month seek disclosure.<sup>94</sup>

While it seems true that the FCRA notification process has made consumers more aware of the mechanisms of consumer reporting, there is reason to believe the notification provision ought to be strengthened. For example, American Service Bureau's business is mainly in life and health insurance reporting; it averages roughly 8,600 of these reports per month.<sup>95</sup> But if only 15 consumers seek disclosure, this is less than 0.2 per cent of those reported on. Yet the latest industry figures say that 3 per cent of all ordinary life insurance applicants are turned down, and that another 6 per cent are given extra-risk rates.<sup>96</sup> Certainly many

---

93. Letter from T.E. Sheahen, Vice President, Credit Information Corporation of Chicago, to U. CHI. L. REV., Nov. 17, 1972. CIC is used as the example because it appears to keep the most careful statistics concerning the FCRA. The figures cited remained unchanged from Jan. 25, 1972 to Nov. 17, 1972.

94. Letter from Claude H. Tinsley, Jr., Exec. Vice President, American Service Bureau, to U. CHI. L. REV., Dec. 8, 1972. Retail Credit Co. branch offices have averaged four consumer contacts per week since the inception of the FCRA. A company study shows that of 1192 consumers who received adverse action notifications, 1031 did not contact the inspection bureau. 114 made contact but agreed with the report content. 47 made contact and questioned the information in the report. Of these 47, 34 resulted in reconfirmation of the original information. In the other 13 cases, the original information could not be reconfirmed. In two of these cases, confirmation hinged on city records unavailable to the public. Retail Credit Co., *The Fair Credit Reporting Act, A Progress Report*, dated October 1972.

95. *Id.*

96. INSTITUTE OF LIFE INSURANCE, LIFE INSURANCE FACT BOOK, 1972 at 95 (1972). Figures are for 1967, when 10,190,000 ordinary life policies were purchased in the U.S. "Of the



of those turned down or up-rated expected as much; but of the remainder, can it really be that so few are curious enough to contact the consumer reporting agency?

One reason for the low turnout rate may be that the FCRA merely requires that the consumer be notified of the fact of adverse action, and be supplied the name and address of the reporting agency. No effort is made to inform the consumer of his rights under the law, with the apparent result that the consumer frequently does not know that he has a right to be informed of the contents of his record or that he can challenge the information in the file.

Moreover, the notification rarely explains why adverse action was taken. Since adverse action often occurs for reasons which have nothing to do with a "bad" record,<sup>97</sup> consumers have sometimes found themselves shuffled back and forth between a reporting agency which gives disclosure but no hint of why adverse action was taken, and a consumer report user who doesn't want to explain his credit policies.<sup>98</sup>

To remedy these defects, *it is suggested that the FCRA be amended to require (a) that adverse action notifications be written, (b) and that they include a brief summary of the consumer's legal rights under the FCRA, and (c) a brief, possibly check-off, explanation for the consumer report user's decision to take adverse action.*

A frequent criticism of the FCRA notification provision is that the consumer is not able to learn of the existence of his file until after the damage is already done. This is not precisely true, because the consumer is given the right, under section 609, to obtain disclosure, regardless of whether adverse action has been taken against him. In practice, however, most consumers are not aware that a file exists or which

---

3% of applications that were not acceptable, less than three-fifths were related to serious health impairments and the rest to other factors, including extremely hazardous jobs." *Id.* Reasons for extra-rating were: heart disease or its symptoms, 33%; weight problem, 16%; other medical reasons, 29%; occupation, 12%; other reasons, 10%. *Id.* This is the sum total of published information located which throws light on the possible impact of insurance inspection reports. However, a Retail Credit Co. manager testified that inspection reports contribute to the declination of 1 - 2% of insurance applications, and to the rating-up of another 3 - 4%. Testimony of A. Freeman, Manager, Retail Credit Co., Oklahoma City, Okla., in *Retail Credit Co. v. Derryberry*, No. CJ-72-36, District Court of Oklahoma County, Okla., April 24, 1972.

97. E.g., the consumer might not meet the minimum income or employment tenure standards of the credit grantor.

98. The ACB, in its widely circulated pamphlet *HOW TO COMPLY WITH THE FAIR CREDIT REPORTING ACT* (1971), recommended that credit grantors make notification whenever they obtain a credit report and subsequently deny credit. A literal following of this advice, which is company policy for at least one of the major national retailing chains headquartered in Chicago, means that many consumers who are turned down for credit are shunted to the credit bureau, even though the credit grantor knows the bureau report is "clean." This creates bad feelings and a sense that someone is lying, both of which could be avoided if the adverse action notification contained a check-list of common reasons for credit denial.



agency has it until adverse action has occurred.<sup>99</sup> In view of this, Senator Hatfield has proposed an amendment to the FCRA which states: "When any consumer reporting agency proposes to furnish a consumer report . . . that agency shall mail, or otherwise deliver, a copy of such report to the consumer to whom it relates."<sup>100</sup>

The cost of the Hatfield proposal would probably be great. One credit bureau in Chicago which sells over a million reports a year estimates that the cost of preparing a copy of each report (paying a clerk to handle the job, and purchasing envelopes and stamps) would be about \$1.30 per report.<sup>101</sup> This may be a high estimate, but the point is clear that the costs of the Hatfield amendment could put many credit bureaus out of business. Equally important, the amendment would make it impossible for a credit bureau to furnish an oral report and would considerably slow a process which serves consumers as well as credit grantors by its speed.

Somewhat different considerations might affect the reports of inspection bureaus.<sup>102</sup> A much smaller absolute number of reports is involved and the cost of sending a copy would represent a smaller proportion of the price of a report. An inspection report, moreover, is generally capable of causing more harm for a consumer than most standard credit bureau reports; not getting insurance can be far more damaging than not getting a charge card. Nevertheless, speed in inspections is a matter of importance to consumers as well as to insurance companies and their agents, and the disadvantages of any reform which would substantially slow the process of obtaining insurance must be considered.

---

99. Since a consumer reporting agency is allowed to make a charge for a disclosure in cases where the consumer has not received an adverse action notification within the past 30 days (FCRA, *supra* note 5, § 612), many agencies have records available on how many consumers seek disclosure purely "for curiosity." The figure is generally less than 10%. Ninety-five percent of the consumers who have contacted Retail Credit Co. branch offices have done so as the result of adverse action notices. Retail Credit Co., *The Fair Credit Reporting Act, A Progress Report*, dated October 1972.

100. S. 968, 92nd Cong., 1st Sess. (1970). A similar statute exists for credit reports in Oklahoma (OKLA. STAT. ANN. tit. 24, §§ 81, 82 (West, 1955)), but it has never been enforced. A state court ruled in May 1972 that this statute applies to the credit reports, but not the insurance inspections, of Retail Credit Co. *Tulsa World*, May 25, 1972. Appeal is pending.

101. Interview with Milton I. Deutsch, President, Chicago Credit Bureau, Jan. 19, 1972.

102. Note that the FCRA distinguishes between simple consumer reports of the type generally prepared by credit bureaus, and "investigative consumer reports", corresponding to the output of inspection bureaus. The latter are defined in FCRA section 603(e), (*supra* note 5), to mean:

a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.



Finally, in weighing the Hatfield proposal one should consider the fact that the majority of consumer reports--possibly a large majority<sup>103</sup>--do not lead to adverse action. This being true, delivery of a copy of each proposed consumer report to the consumer-subject would have little practical effect and would likely represent much economic waste. Unless the consumer were, in effect, given the power to enjoin a consumer reporting agency from selling a report about the consumer because the consumer objects to the content, the only benefit of the Hatfield proposal would be to allow a consumer to try to convince the reporting agency, prior to dissemination, that the report is in error. But the FCRA already permits errors to be corrected, and it stands to reason that a credit grantor or insurance company which is in business to give credit and to sell insurance will reconsider an adverse action once it is called to their attention that the information upon which the adverse decision was based was erroneous. Although this conclusion can not actually be viewed at this time, indications that this reasoning is incorrect did not appear during this course of this study.

## B. ACCESS

A second problem noted by the Senate Report was that if a consumer learned about the existence of his file he was generally not given access to the information in it.<sup>104</sup> Retail Credit Co., for example, had a policy which directed managers not to show a report to its subject: "Information involving rumors or third-party hazard or that the average person would resent or that might expose our informants, cannot be discussed with the subject."<sup>105</sup> Some credit bureaus, the Senate Report found, discouraged consumer interviews "by placing a nuisance charge on the investigation, or merely placing the date of the interview as much as 2 weeks away."<sup>106</sup> The FCRA's response to the access problem will be discussed in relation to five questions: (1) who should have access to file information? (2) when should access occur? (3) what types of physical contact with the record should be permitted? (4) to what extent should information be disclosed? and (5) how should the cost of access be allocated?

103. See note 96 *supra*. The precise influence of consumer reports upon credit grantors defies generalization. *E.g.*, one large national finance company rejects 70% of its loan applicants but draws credit reports on only 40 - 50% of all applicants, and lacks figures on the impact of credit reports. A competing finance company draws reports on 100% of applicants, denies 50%, and estimates that 20% of the denials are based on credit reports. The installment loan department of a neighborhood-type bank draws reports on 100% of its loan applicants, rejects 10%, and estimates that credit reports account for 50 - 75% of the rejections. A systematic survey seems required to go beyond these samplings to establish the impact of credit reports.

104. S. REP. NO. 91-517, *supra* note 51, at 3.

105. Retail Credit Co. *Manager Manual* page C-75, dated Oct. 1963. Present policy is in accord with FCRA requirements. See Retail Credit Co. memorandum concerning compliance with the FCRA, dated June 18, 1971.

106. S. REP. NO. 91-517, *supra* note 51, at 3.



### 1. Who Should Have Access to File Information?

The FCRA requires disclosure of file content to the appropriate consumer either in person or by telephone, if he first furnishes "proper" identification.<sup>107</sup> If there is a personal interview, the consumer may be accompanied by one other person of his choosing, who must furnish "reasonable" identification.<sup>108</sup>

The concepts of "proper" and "reasonable" identification have occasionally been stretched by the consumer reporting agencies to create an obstacle for consumers. For example, the American Service Bureau has a form, reproduced in Appendix Four, which must be filled out before the consumer will be given disclosure over the telephone. Many of the questions leave the clear impression that the form was intended for the collection of information rather than for simple identification. In addition to the identification form, many reporting agencies require the consumer to sign a waiver agreement prior to disclosure. The waiver, an example of which is found in Appendix Four, often impresses consumers as an implied threat that the reporting agency will investigate anyone who causes trouble. Such a waiver is both premature, in that only a small portion of disclosures result in further investigation;<sup>109</sup> and overly broad, since it can be used, for example, to authorize a doctor to disclose confidential medical records even though the item of information called into question by the consumer may be non-medical.<sup>110</sup> *It is suggested that the FTC, which has enforcement powers under section 621 of the FCRA, should render a formal interpretation that such "chilling" identification and waiver forms violate the intent of section 610, which provides for disclosures to consumers.*

### 2. When Should Access Occur?

The FCRA requires only that disclosure be made "during normal business hours and on reasonable notice."<sup>111</sup> A recommendation that certain off-business hours be provided to facilitate access for working people<sup>112</sup> was rejected by Congress. No Chicago reporting agency has voluntarily established special hours. Rather than take time off from

---

107. FCRA, *supra* note 5, § 610(b).

108. FCRA, *supra* note 5, § 610(d).

109. *E.g.*, the Chicago office of Retail Credit Co. has conducted re-investigations as a result of only 7½% of its disclosures. Letter from Henry McQuade, Retail Credit Co., to U. CHI. L. REV., Feb. 23, 1972.

110. The purpose of a waiver is not clear. If authorization is needed for re-investigation, on what authority was the original investigation carried out?

111. FCRA, *supra* note 5, § 610(a).

112. See testimony of Virginia Knauer on behalf of the Administration, *Sullivan Hgs.*, *supra* note 37, at 556.



work to visit a consumer reporting agency, many consumers have relied on telephone disclosure.<sup>113</sup>

The "reasonable notice" provision seems to be complied with in satisfactory fashion by most consumer reporting agencies visited in Chicago. In many instances, a consumer can walk in off the street without giving previous notice and receive prompt attention.<sup>114</sup> A few agencies, however, have set up obstacles by telling the consumer his file is located in another city or that disclosure can only be made by a particular executive who happens to be out of town.<sup>115</sup>

### 3. *What Types of Physical Contact With the Record?*

The FCRA pointedly does not give the consumer a right to see or hold his file, saying only that the reporting agency must "disclose" "fully and accurately" the "nature and substance" of the file.<sup>116</sup> This has been one of the most controversial provisions in the law, with many consumers complaining that reporting agencies do not disclose everything in their files.<sup>117</sup> There is no way to confirm how often selective disclosure actually occurs,<sup>118</sup> but the widespread belief that the practice takes place makes it necessary to reconsider the wisdom of forcing the consumer to take the reporting agency's word that it is not hiding sensitive materials to avoid embarrassment or possible litigation.<sup>119</sup>

113. The extent of reliance upon the telephone for disclosures varies greatly from reporting agency to reporting agency. The Chicago office of Retail Credit Co. estimates that half of its disclosures are by phone, half in person. Interview, Tom Linnen, Manager-Operations, Jan. 20, 1972. The Credit Information Corporation of Chicago handles 22% of its disclosures by telephone, 8% by personal interview, and 70% by mail. Letter from T.E. Sheahen, Vice President, Nov. 17, 1972. Although the mailing procedure does not appear to be permissible under section 610 of the FCRA, it is probably the method best serving the interests of the consumer, provided that all codes and terms are put in layman's language. Section 610 should be amended to reflect this possibility.

114. See Star, *Who Knows What Evil Lurks in Your Credit File*, Chicago Tribune Magazine, June 18, 1972.

115. This generalization is based upon several letters received by the University of Chicago Law Review from consumers outside of Chicago, and upon experience of the author in Washington, D.C. One problem seems to be that national inspection bureaus have sub-offices where trained personnel, required by section 610 to be provided in order to explain information disclosed to a consumer, are not available. Retail Credit Co. takes the position that sub-offices are not required to have trained personnel on hand for disclosures at all times during normal business hours. Retail Credit Co. memorandum concerning FCRA section 610, dated Feb. 26, 1971.

116. FCRA, *supra* note 5, § 609. Certain exceptions are explored in the text at note 127 *infra*.

117. Telephone interview with Erma Angevine, Exec. Dir., Consumers Federation of America, Dec. 27, 1971.

118. One example: James Millstone, assistant managing editor of the St. Louis Post Dispatch, lost his automobile insurance as a result of an inspection report which said, among other things, that he was a hippie-type person, disliked by his neighbors, who used drugs and put up out-of-town demonstrators all over his house. Millstone twice obtained disclosure from the reporting agency, National Inspection Bureau. Not satisfied that everything had been disclosed, Millstone wrote to the headquarters of the Bureau. Six days later he received a letter advising him that there was additional material in his file, some of it adverse, which the reporting agency "inadvertently failed to disclose" during the interviews. Letter to Millstone from David B. Slayback, Jan. 20, 1972. See St. Louis Post Dispatch, April 11, 1972, at 3A, col. 1.

119. Retail Credit Co. emphasizes to its employees that disclosures will be made *upon request* of the consumer, and states that there are three requests which the consumer may make: what do you have on file about me? who told you that? and, to whom did you send that information? The



Why should the consumer not be allowed to read his own file? The principal answers given by the reporting agencies will be considered one at a time. First, it is said,<sup>120</sup> if the consumer can get his hands on the file, he might destroy it. This problem could be circumvented by offering to provide a copy of the file. (Most investigative files contain only one or two sheets.)<sup>121</sup>

But if the consumer is furnished with a copy of his report, it is then argued,<sup>122</sup> he might counterfeit or falsify the report, thereby leading to poor business decisions and an erosion of confidence in the integrity of the reporting system. Moreover, the argument continues, agencies will not be called upon to sell more than one report on an individual, because after the first report is prepared consumer report users will seek copies of the report from the consumer, thereby saving the expense of obtaining reports from the agencies.<sup>123</sup> This seems to assume that consumers will carry around copies of their reports like references, and that credit grantors, insurance companies, and employers will be too dull to recognize the possibility of falsification. In reality, it is precisely the desire for independent sources of information which leads consumer report users to buy reports, and it is difficult to believe that many present users would want to take the consumer's word that his copy is up-to-date and authentic.

Another argument contends that if the consumer were given a copy of his report, others, including employers, police, or the Internal Revenue Service, could require the consumer to provide that copy as a prerequisite for various benefits. Despite these crocodile tears for the consumer's privacy,<sup>124</sup> section 604(2) of the FCRA already allows a reporting agency to furnish reports "in accordance with the written instructions of the consumer to whom it relates."

A fourth argument states that if the consumer had a copy of his report he could learn the code numbers for various subscribers, and might be enabled to use these codes to obtain unauthorized releases of information about other consumers. This argument has merit; but it

---

first question (or words to its effect) initiates disclosure of the nature and substance of the file. The second and third questions must be asked each time the consumer wants the information. Retail Credit Co. memorandum concerning compliance with FCRA section 609, dated June 18, 1971. This would present the possibility of disclosing less than everything that would be important to the consumer, especially if the consumer is unaware that he is involved in a guessing game.

---

120. *Sullivan Hgs.*, *supra* note 37, at 110.

121. Testimony of Retail Credit Co., *Sullivan Hgs.*, *supra* note 37, at 474.

122. Retail Credit Co. flyer, *Hazards in Giving Subject a Copy of Report*.

123. It has been suggested that allowing copies to circulate would reduce reporting agency sales, and that this would be a deprivation of property without just compensation. *Id.*

124. *Proxmire Hgs.*, *supra* note 48, at 232.



only applies to credit bureaus, since inspection bureaus don't operate on the same kind of code system. Accepting this argument in regard to credit bureau reports would not entail that inspection bureaus, as well, should not release copies of reports.

A fifth argument against furnishing the subject with a copy of his report is that this practice would invite nuisance lawsuits.<sup>125</sup> There are two answers to this. First, if disclosure is as full and accurate as the FCRA requires there is already sufficient possibility of litigation, and this would not be augmented by the fact that the consumer has a copy. Indeed, the consumer is presently permitted to take notes during disclosure, and, if he desires, be accompanied by an attorney.

Second, the FCRA protects the consumer reporting agencies sufficiently under section 610(e), which states that unless there is negligent or willfull noncompliance with the FCRA,

no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed (under the FCRA), except as to false information furnished with malice or willfull intent to injure such consumer.<sup>126</sup>

Finally, it is argued, providing a copy of a report to the consumer would allow him to learn about certain items of information which public policy dictates should not be revealed. This argument can best be considered in answer to the next question; "to what extent should information be disclosed?"

#### 4. *To What Extent Should Information Be Disclosed?*

The meat of the FCRA disclosure requirement is found in section 609, which states that the consumer reporting agency shall "clearly and accurately disclose...the nature and substance of all information (except medical information) in its files, on the consumer at the time of the request." This includes identification of the sources of information, "except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed."<sup>127</sup> Finally, section 609 provides an "audit trail," stipulating that disclosure shall include the names of recipients

125. Flyer, note 122 *supra*.

126. See articles cited in note 25 *supra*.

127. FCRA, *supra* note 5, § 609(a)(2). The section continues, "Provided, That in the event an action is brought under [the FCRA], such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought." (Emphasis added).



of any consumer report on the consumer which was furnished in the past six months, or two years in the case of employment reports.

a. *Medical Information.* A consumer reporting agency is not required to disclose medical information. This is a potentially important exception in the law, and its evaluation requires additional background about the personal information market. Four informational systems will be described.

The need for medical information in underwriting life and health insurance is obvious and widely accepted by the public.<sup>128</sup> The best known method by which underwriters obtain medical information is through medical examinations, usually carried out by physicians retained by the insurance company. Medical examination information traditionally moves directly to the underwriter, without intermediary.

Retail Credit Co. is now entering this area by establishing a chain of paramedical service centers. According to the 1971 Retail Credit Co. Annual Report, a subsidiary,

Physical Measurements, Inc., will accelerate expansion in 1972. This chain of health history gathering centers, formerly known as Medical Service Centers, was established to free physicians from laborious technical tasks and to speed processing of life and health insurance applications. . . They are staffed by technicians trained to receive medical history, perform certain laboratory tests and take the physical measurements of applicants for life and health insurance. The centers now produce 4,000 reports per month. While we have not yet officially entered the pre-employment or employee market, we are already doing these measurements for several insurance companies' agency departments. . . Our plan is to establish 100 centers as quickly as feasible.<sup>129</sup>

Presumably a copy of each report would be retained by the paramedical center in case the original gets lost. If these copies were to be made available to the parent company's inspectors for future insurance or employment reports, the paramedical centers would open up a vast new resource of information to the world's largest private investigating company.

To supplement the information in the application for insurance and in the medical examination (if one is required), the underwriter may

---

128. In 1970, Retail Credit Co. commissioned the Opinion Research Corporation to study public attitudes toward certain investigations. One question asked, "If a person applies for a life insurance policy, do you agree or disagree that the life insurance company has a right to investigate this person on . . . his health and medical history?" Ninety-two per cent of the sample agreed. In 1972, a similar study showed that 90% agreed. ORC Study, 6.

129. *Id.*, at 7.



obtain an Attending Physician's Statement (APS) from the applicant's doctor. The APS is usually purchased from the physician, who mails it directly to the underwriter. In 1971, approximately 4.7 million APS's were obtained in the U.S.<sup>130</sup>

When an insurance company deals directly with an attending physician it often takes from 18 to 20 days to get the health information.<sup>131</sup> To cut down on the time and on the hidden costs, many insurance companies are turning to Retail Credit Co.'s Underwriting Medical History (UMH) service. UMH claims that it can reduce the time to an average of 9 days and can reduce the total cost to the insurer from about \$12 to slightly more than \$10.<sup>132</sup> According to *Inspection News*, the in-house magazine of the Retail Credit Co., the selling of UMH services was the number one sales priority for 1972.<sup>133</sup> In June 1972, Retail Credit's offices handled over 26,000 APS reports.<sup>134</sup> When Retail Credit Co. obtains an APS it keeps a copy for its files, to be used as a lead in future inspections.<sup>135</sup>

As has already been noted, most insurance companies employ independent inspection bureaus to bolster their other sources of information. H. Laurence Ross, in an essay titled "Personal Information in Insurance Files," observed:

Limitations imposed by the abilities of the inspectors and the adequacy of their sources of information minimize the amount of medical information that can be obtained reliably; gross matters such as blindness and amputations are the principal items concerning which reports can be made.<sup>136</sup>

Further examples, not so "gross" as Ross suggested, may be found in a typical Form 930, a record of "significant" information obtained by a Retail Credit Co. inspector during his working day; e.g., "spleen problem," "polio--age 25, right arm," "wife's colonitis--nerves," "eye injury," etc. This information remains in the inspection bureau's files for future use.

The fourth source of medical information for underwriters is an intercompany data bank known as the Medical Information Bureau (MIB), which serves more than 700 life insurance companies, some of

---

130. Trotochaud, *UMH, A Marketing Miracle*, *INSPECTION NEWS*, Sept.-Oct. 1972 at 9.

131. *Id.*

132. *Id.* The article relates that Retail Credit Co. paid doctors' fees on only 42.3% of the APS's, averaging \$7.18 per payment.

133. *Id.*

134. *Id.*

135. Interview with Tom Linnen, Manager-Operations, Retail Credit Co., Chicago, Jan. 20, 1972.

136. In *ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE*, *supra* note 28, at 207.



which also issue health insurance. Medical backgrounds on 12 million individuals are in MIB computers in Boston.<sup>137</sup>

MIB was founded in 1902. Not listed in the Boston telephone directory and unknown to most physicians and patients, it grows by 400,000 files a year and answers 80,000 queries a day.<sup>138</sup> Data enters the MIB when an underwriter finds a reportable condition during his review of an application (including the supplementary informational materials). The underwriter reports the condition in code. Only selected officials at the member insurance companies have access to the code book, and clerical personnel at the MIB are said to be ignorant of the meaning of the codes.<sup>139</sup>

The MIB is needed, according to the insurance companies, so that the effects of lying or forgetfulness by insurance applicants can be minimized. Member companies are not allowed to deny an applicant or assign an extra rate solely on the basis of MIB information. The MIB's rules require that information be verified through current medical examinations and inspections.<sup>140</sup> Violation of the rules can lead to direct sanctions, including expulsion. The rules are enforced by medical professionals who are pledged to their enforcement. The fact that insurance companies are competitive and see no benefit in rejecting potentially profitable business without proof of hazard is believed to be a third strong reason for the MIB rules to be followed.<sup>141</sup>

Most of the codes in the MIB refer to physical diagnoses. However, there are also codes for psychiatric disorder, attempted suicide, anxiety reaction and reactive depression, nonconformity (e.g., drinking), environment (e.g., condition of the home and status of the neighborhood), and individuals "who are predatory and follow more or less criminal pursuits, such as racketeers, dishonest gamblers, prostitutes, and dope peddlers."<sup>142</sup> An underwriter desiring more detail than provided by the code may request the MIB to get it from the source.

Like inspection reports, the insurance companies attempt to keep the MIB reports confidential. An Aetna Life and Casualty underwriting manual notes,

---

137. See, *Insurance Data Bank Attacked as Abuse of Confidentiality*, HOSPITAL PRACTICE, 47 (Aug. 1972). The article is based on Hearings, not yet published, of the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, concerning the health and accident insurance industry, May 1972. See also, Ross essay, *supra* note 136 at 208.

138. *Id.*

139. *Id.*

140. Where an insurance company is put on warning about an applicant by an MIB code, if the company does not carry out an investigation it may be estopped from objecting to a later claim on the ground that the application was false. *Major Oil Corp. v. Equitable Life Assur. Soc. of U.S.*, 457 F.2d 596 (10th Cir., 1972).

141. Ross essay, *supra* note 136 at 211.

142. *Id.*, 209-10; HOSPITAL PRACTICE, 139 (Aug. 1972).



Confidential information received from any source, and in particular from Company medical examiners, applicants, attending physicians, veterans medical records, letters from other companies and the MIB must be treated as highly confidential. Neither the source nor the nature of the information may be revealed to the field office, agent or applicant in any manner.<sup>143</sup>

Occidental Life, in its health insurance underwriting supplement, tells underwriters that MIB

Codes are confidential in nature and neither the details nor the fact that information was obtained from a code bureau is to be disclosed to anyone except an authorized person within the Company. . . No written interpretation of codes is to be made in the [applicant's] file.<sup>144</sup>

The importance of the MIB in underwriting is difficult to evaluate, because it is not known how much significant information would have turned up from other sources without benefit of the MIB's "red-flag" function. In 1971, however, Metropolitan Life Insurance Company paid \$183,307 for services from MIB's computer.<sup>145</sup> It received 145,000 applications for individual health insurance; for the 145,000, the MIB yielded significant "unadmitted" information on 3,000 applications, which led to special inspections; as a result, 1,800 applicants were refused policies.<sup>146</sup>

While the FTC has not made an official interpretation of the FCRA in regard to its coverage of the MIB, there are indications that the FTC staff considers the MIB to be exempt under the medical information exception in section 609.<sup>147</sup> If so, it will be argued that the FTC staff is in error.

The MIB fits under the section 603(f) definition of a consumer reporting agency as a regular assembler of consumer information for distribution to third parties (insurance companies) for insurance purposes. The question is whether the MIB finds an exception because a consumer reporting agency doesn't have to disclose medical information. Section 603(i) states,

The term "medical information" means information or records obtained, with the consent of the individual to whom it relates, from licensed physicians or medical practitioners, hospitals, clinics, or other medical or medically related facilities.

143. Information supplied by staff of Subcommittee on Antitrust and Monopoly, U.S. Senate, believed to be up-to-date.

144. *Id.*

145. HOSPITAL PRACTICE, 139 (Aug. 1972). This compares to \$4.4 million expended on inspection report fees. Annual Statement for the Year of 1971 of the Metropolitan Life Insurance Co.

146. *Id.*

147. *Id.* at 143.



The FTC staff has unofficially advised, "Medical information includes records from physicians and medical facilities, and does not include comments on a consumer's health by non-medical personnel."<sup>148</sup> The legislative history adds no further gloss: the medical information exception was added at the last moment, in conference committee, on the theory that medical information should only be tendered with counsel of a physician.<sup>149</sup>

In approaching the MIB, three points ought to be kept in mind. (1) At least some of the information retained in the computer is not medical within the statutory definition. This would have to be made available to the consumer under the FCRA. (2) Some of the information probably did not derive from medical sources, i.e. it may have been supplied by the applicant, agent, inspector, or underwriter. This would not meet the statutory exemption standard. Query: would information originally obtained from a physician, but which passed through various clerks and underwriters who selected particular aspects and converted what may have been complex data into a simple code, be considered "from a licensed physician" within the statute? (3) The statute carefully includes the element of consent. But if the individual is not aware of the MIB's existence and believes that his authorization for disclosure of medical records was given to one insurance company for one purpose, can it really be argued that he has consented to the circulation of this medical history to a potential 700 insurance companies?

*It is suggested that the FTC interpret section 603(i) to imply knowing consent.* This would have several effects. First, it would give the individual access to the MIB file so that he could be aware of and, if necessary, challenge his record. Second, it would give the individual access to APS data in an insurance inspection bureau file. Third, it would give the individual access to paramedical reports which might find their way into an inspection bureau's file.

But, it may be asked, if the individual is to have access to all this information, what purpose is served by retaining a medical information exception? It is possible, of course, that a consumer reporting agency might learn that a particular consumer has a dreadful disease about which the consumer has not been informed. The medical information exception might be justified in such a situation. However, such a situation must surely be rare, and it could be handled tactfully by referring the consumer to his physician. As the law presently reads, a reporting agency wouldn't have to disclose medical information even to the consumer's physician--even if the consumer authorizes such a disclosure in

---

148. 4 CCH CCG, *supra* note 22, § 11,306 at 59,793.

149. H. R. CONF. REP. NO. 91-1587, 91st Cong., 2d Sess. (1970).



writing. *The medical information exception should be replaced by a permissive provision allowing the consumer reporting agency to make disclosure of medical information to the consumer's physician, instead of directly to the consumer, provided that the consumer is informed (a) that there is medical information being withheld and (b) this information will be disclosed to a physician designated by the consumer.*

b. *Sources of Investigative Consumer Reports.* Section 609 (a) of the FCRA requires that the consumer reporting agency disclose sources of information, except where the information is acquired for use in an investigative consumer report. In practice this means that a consumer can learn of the institutional sources of a credit bureau report but cannot learn of the sources of relatively subjective information found in an inspection bureau report. In a real sense the exemption of sources of investigative consumer reports deprives the consumer of the opportunity to confront his accusers; yet the opposite position, that all sources should be disclosed at the outset (rather than during litigation), is not without merit. Indeed, it is argued by the inspection bureaus that disclosure of sources of investigative reports would put them out of business. If this is true, then the real question is not what to do with sources, but whether inspection bureaus serve a valid purpose.

In fact, one doesn't have to choose between extremes. It is probably true that the man on the street would be less willing to make truthful negative statements about his associates if he knew that his comments to an investigator might ultimately be disclosed to the subject. It is also probably true that some sources might suffer reprisals, even violence, if source identification is revealed. However, even under the FCRA as it exists, the possibility of disclosure of sources is real. Sources may be identified by inference from other information that is disclosed under section 609.

If there is a re-investigation due to a consumer's challenge of reported information, the source will probably be put on notice that his earlier statements had been questioned. The FTC informally advises that re-investigations might include returning to the original source, in which case "it is only fair, both to the sources and the consumer, to warn the sources that their names could be discovered if litigation should ensue."<sup>150</sup> Nonetheless, disclosure of sources prior to litigation would probably have a significant impact on the awareness of informants that their names could be discovered, and would probably lead to the much-feared "drying up" of the flow of information. The pro's and con's of eliminating the source exception are difficult to weigh, and it would probably

---

150. 4 CCH CCG, *supra* note 22, ¶ 11,306 at 59,796.



be premature to take this step, which could wipe out a useful industry, without more information, especially when the consumer has the alternative of litigation where the withholding of source identification appears to be causing significant damage.

Even if full disclosure of sources is rejected, the fear of revealing sources is no justification for failing to require the provision of a copy of an investigative report to the consumer. The usual procedure for inspection bureaus is to include in a report the number of informants and the length of time informants have known the subject, but not the actual identity of informants. Where such identity is retained for the file (and it isn't always retained), it is usually written on the back of the file copy of the report. A reproduction of the file copy would not disclose the source. Moreover, if the medical information exception is interpreted as suggested (i.e., to stress knowing consent) there would be little likelihood of a copy of a report disclosing exempted medical information.

*Inspection bureaus should be required to disclose a copy of all reports that have been made on the consumer.* This recommendation might lead some reporting agencies to avoid putting sensitive information into writing by transmitting such information orally.<sup>151</sup> Enforcement might be difficult, but *the FCRA should be amended to require that all investigative consumer reports be reduced to writing.* In order to insure that sources are available to a consumer during litigation, *the FCRA should be amended to require that the identity of all investigative sources be retained in-file for a reasonable length of time, e.g. one year.*

##### 5. *How Should the Cost of Access Be Allocated?*

Disclosure of file content involves certain economic costs. Most credit bureaus have had to hire additional employees to staff a consumer relation division which can cope with the new flow of consumers seeking disclosure. Inspection bureaus, which generally require disclosures to be made by high-ranking executives, must consider the cost of executive time taken up in consumer contacts. Time to pull a file, read it to a consumer, and perhaps counsel the consumer on how to improve his record,<sup>152</sup> all cost enough to make increased rates a possibility.

---

151. "It is sometimes unwise to submit an unfavorable report in writing, where the information is difficult to prove legally, to a small or new local account or to an account of unknown quality even in another city." Retail Credit Co. *Manager Manual*, page C-27, dated Oct. 1963. In reply to the question, "Under what circumstances do you transmit reports orally to clients?" Retail Credit Co. responded, "Only when customer needs rush handling. Field Representatives would call the customer and give the information orally, but this is always followed by a written report. Would apply to well under 1% of our reports." Letter from Henry A. McQuade, to U. CHI. L. REV., Feb. 23, 1972.

152. A common example of such counselling involves explaining the procedure for filing a notice of judgment satisfaction at the court in order to clear the record of a paid-up debt which is still officially outstanding.



The FCRA permits the consumer reporting agency to make "reasonable" charge to any consumer who was not the subject of adverse action within thirty days.<sup>153</sup> This charge averages \$5,<sup>154</sup> but because very few consumers seek disclosure merely because of curiosity,<sup>155</sup> the reporting agencies have absorbed most of the cost of disclosure. This seems equitable, since the reporting agencies (and if prices are raised, their clients) should consider the consumer's well-being a part of the cost of engaging in a business which necessarily carries with it the possibility of harming consumers. *But if this is true, why should any consumer bear the cost of disclosure?*

### C. CORRECTIONS

A third problem pointed out in the Senate Report was that consumers sometimes had difficulty in correcting inaccurate information in their files:

Some credit reporting agencies proceed on the assumption that an individual is guilty until proven innocent and refuse to delete information which is no longer verifiable unless the consumer can prove otherwise. In other cases, the consumer may have difficulty in getting his version of a legitimate dispute recorded in his credit file.<sup>156</sup>

The FCRA attacked this problem by stating in section 611 that if a consumer challenges any information in his file the reporting agency must re-investigate and record the current status of the information.<sup>157</sup>

For a credit bureau, a re-check is not expensive, since it generally involves no more than a couple of telephone calls. Where investigative consumer reports are involved, on the other hand, the re-investigation (or "re-handling") necessitates sending an inspector into the field to talk with the original or additional sources. Because of the possibility of litigation an executive actively concerns himself with the case, with the result that an average re-handling may cost as much as \$100, including management and clerical time.<sup>158</sup>

153. FCRA, *supra* note 5, § 612.

154. Retail Credit Co. charges \$5. If a Motor Vehicle Report is included in the disclosure, the cost is added on. Retail Credit Co., memorandum concerning compliance with FCRA section 609, addendum, June 24, 1971.

155. See note 99 *supra*.

156. S. REP. NO. 91-517, *supra* note 51, at 3.

157. Re-investigation is not required if the reporting agency "has reasonable grounds to believe that the dispute by the consumer is frivolous or irrelevant." FCRA, *supra* note 5, § 611(a). The FTC staff has warned that "frivolous or irrelevant" must not be used as a loophole. 4 CCH CCG, *supra* note 22, § 11,306 at 59,795. The reporting agencies interviewed stated that they had not had occasion to decline a requested re-investigation.

158. Letter from Henry A. McQuade, Retail Credit Co., to U. CHI. L. REV., Feb. 23, 1972. The average handling time per contact for Retail Credit Co. is twenty-four minutes. Retail Credit Co., *The Fair Credit Reporting Act, A Progress Report*, dated October 1972. The Illinois Service Bureau estimates its cost of re-investigation to be no more than \$25, all inclusive. Interview with William Dorf, President, I.S.B., Chicago, Nov. 14, 1972.



How intensive a re-investigation is required? The law is silent, but the FTC staff has recommended that the re-investigation must be a good-faith effort, and it should include checking with the original source, who ought to be informed of the nature of the dispute. Additional sources might also be contacted, the FTC staff suggests, and fairness would dictate that the sources be warned that their names could be discovered in litigation.<sup>159</sup>

The most typical causes of dispute include faulty identification of subjects by the reporting agency, frequently involving a confusion of "juniors" and "seniors," or the misfiling of information due to the presence of many files on people with the same last name. These problems are easily resolved under the section 611 procedures.

Another recurring problem results from the fact that there is no mandatory public filing of judgment satisfactions, releases on tax liens, and other documents which would signify to a reporting agency that a consumer had fulfilled his obligations. Thus an accurate representation of the public record as it exists at the time a report is furnished may not be an accurate representation of the consumer's financial and legal position. *State legislation making mandatory and timely filings of satisfactions of judgments, releases, dismissals, and such other documents pertinent to the disposition of suits, judgments, and liens is clearly indicated.*<sup>160</sup>

A third type of dispute which regularly occurs arises where the reporting agency is convinced that the consumer is lying. For example, an automobile insurance applicant, knowing that it will increase his premium if the insurer learns that he drives to work and parks his car on the street at night, might falsify the application. But if he fails to inform his family and neighbors of the falsification the insurance inspector will learn the truth. He may even note in his report that he observed the car parked on the street at night but couldn't locate it at the consumer's residence during the day. Nevertheless, when the consumer is notified that he has been up-rated, he demands that the inspection bureau re-investigate. By this time, of course, the family and neighbors have the story straight, and the car is temporarily kept in the garage.

Under section 611(a) of the FCRA, the inspection bureau would have to delete the original information because it could no longer be

---

159. 4 CCH CCG, *supra* note 22, § 11,306 at 59,795.

160. This has been recommended by the Governor's Task Force on Credit and Personnel Reporting in California. *Sullivan Hgs.*, *supra* note 37, at 126. The President of Hale-Prietsch Services suggests that the debtor should pay the \$2 filing fee in Chicago, but that the plaintiff's attorney should be obligated to file a notice of satisfaction when a judgment has been satisfied. Interview with Paul Prietsch, President, Hale-Prietsch Services, Chicago, Jan. 18, 1972.



verified. This does not make particularly good sense, and some inspectors admit that they handle this kind of situation by reporting that the re-investigation has confirmed the original information through additional (un-named) sources. Such a course would make the inspection bureau susceptible to suit under section 616 of the FCRA, but the chance of the consumer pursuing the matter into court is believed to be minimal.

The majority of disclosures do not lead to re-investigation.<sup>161</sup> Apparently the proportion of consumer reports containing errors is not large,<sup>162</sup> and most consumers who seek disclosure are satisfied with the knowledge that their record, however unfavorable, is accurate.

If a re-investigation occurs and it is found that the disputed information was indeed mistaken, or if the original information can no longer be verified, the reporting agency must promptly delete the information from its records.<sup>163</sup> At the time of deletion, the agency must clearly disclose to the consumer that he may request the agency to furnish notification that the item has been deleted to any person specifically designated by the consumer who has received a consumer report within the last six months.<sup>164</sup> Interviews with consumer report users indicate that this provision is rarely, if ever, utilized.

If a dispute is not settled by re-investigation, the FCRA allows the consumer to file a brief statement setting forth the nature of the dispute.<sup>165</sup> The agency may limit the statement to one hundred words if it provides assistance to the consumer in writing the statement.<sup>166</sup> This provision has not been invoked with any frequency. During the first half-year under the FCRA, the largest credit bureau in Chicago had only 10 supplemental statements.<sup>167</sup>

161. Retail Credit Co. re-handles 7½% of disclosures, American Service Bureau, 15%, Credit Information Corporation of Chicago, 25%, and Credit Bureau of Western Cook County, 10%. Sources listed in Appendix One.

162. Of the reports re-investigated under the FCRA, the American Service Bureau has found it necessary to revise 25%, Illinois Service Bureau, 0% (there was one re-investigation), Credit Information Corporation of Chicago, 10%, and Credit Bureau of Western Cook County, 5%. Sources listed in Appendix One. This is generally in line with information provided to the Governor's Task Force on Credit and Personnel Reporting in California in 1969, where reporting errors were discovered in 7% of the credit reports, and 5% of the personnel reports which were re-investigated. *Sullivan Hgs.*, *supra* note 37, at 130.

163. FCRA, *supra* note 5, § 611(a).

164. FCRA, *supra* note 5, § 611(d).

165. FCRA, *supra* note 5, § 611(b). The statement (or a summary or code) must be included in all subsequent consumer reports. FCRA, *supra* note 5, § 611(c).

166. At TRW Credit Data the supplementary statement is given a code summary, which enters the computer. The full statement remains in a manual file and is read to the inquirer by an operator. Interview with Gilbert Hamblet, Vice President, TRW, Chicago, Jan. 12, 1972.

167. Interview with T.E. Sheahan, Vice President, Credit Information Corporation of Chicago, Chicago, Jan. 25, 1972.



It has been suggested<sup>168</sup> that corrections and supplemental statements should be sent to other consumer reporting agencies as well as to consumer report users in order to reduce the consumer's task in setting his record straight. The consumer, of course, is free to do this on his own, at his own expense; but to place this burden on the consumer reporting agency would be unworkable in a metropolitan area like Chicago, where the corrections would have to be sent to dozens of agencies, not to consider the non-local reporting market.

#### D. CONFIDENTIALITY

A fourth problem of the consumer reporting industry noted in the Senate Report was that information in a person's credit file is not always kept strictly confidential.<sup>169</sup> An example of the easy relationship that existed between the consumer reporting agencies<sup>170</sup> and the government may be seen in the following excerpt from the Retail Credit Co.'s Manager Manual:

[Requests for file information from Federal authorities] usually come from FBI men, and investigators from the Intelligence Units of the Internal Revenue Service of the U.S. Treasury Department. . . Where Treasury Department investigators ask to photostat our files, assure yourself that the investigator understands that the information is only hearsay and not guaranteed information. . . Make such notes from what you learn from the inquiring authority, as will help on future investigations, but be sure they are used only as tips to direct the inspector handling an inquiry on the case, to enable him to develop the factual information. The inspector must not reveal in his report that we have had this inquiry from a government agency.<sup>171</sup>

Besides government agencies, private individuals who lacked any legitimate purpose were sometimes able to gain access to consumer reports. An example which seemed to impress the Senate<sup>172</sup> involved a completely fictitious company created by a TV network for the purpose of testing the procedures of credit bureaus. The fictitious company was able to obtain 10 out of 20 reports requested at random from 20 credit bureaus.<sup>173</sup>

In response to the apparent looseness of reporting agency procedures, the FCRA set forth three permissible circumstances under which

168. Note, *Protecting Consumers from Arbitrary, Erroneous, and Malicious Credit Information*, 4 U. CAL. DAVIS L. REV. 403 (1971).

169. SEN. REP. NO. 91-517, *supra* note 51, at 4.

170. Not all reporting agencies were equally willing to cooperate with the government, but the courts generally came down on the side of the governmental investigators. See, e.g., *U.S. v. Davey*, 426 F.2d 842 (2d Cir. 1970).

171. Page C-82, dated Oct. 1963. Policy changed since FCRA.

172. SEN. REP. NO. 91-517, *supra* note 51, at 4.

173. See A. MILLER, *ASSAULT ON PRIVACY* 72 (1971).



a consumer report can be furnished by a consumer reporting agency. A report can be furnished: (1) In response to a court order; (2) In accordance with the written instructions of the subject; and (3) To a person whom the agency has reason to believe has a legitimate business need for the information in a credit, employment, insurance, or other business transaction<sup>174</sup> with the consumer.<sup>175</sup>

There are several additional provisions supporting these permissible purpose rules. Reporting agencies are required to maintain reasonable procedures for compliance, and these include that prospective users of consumer reports "identify themselves, certify the purposes for which information is sought, and certify that the information will be used for no other purpose."<sup>176</sup> Any person who knowingly and willfully provides information concerning an individual from a reporting agency's files to a person not authorized to receive that information is subject to fine and imprisonment.<sup>177</sup> Conversely, one who obtains information from a consumer reporting agency under false pretenses is also liable to fine and imprisonment.<sup>178</sup>

To comply with the FCRA, consumer reporting agencies modified their service contracts by adding a section outlining the FCRA and binding the recipient of any report to comply with the law in all respects.<sup>179</sup> In effect, any subscriber who signs the agreement gives a continuing certification that he has a legitimate purpose and will make legitimate use of any report he requests. The potential weaknesses of this system have been frequently commented upon,<sup>180</sup> but an alternative system which would be both workable and foolproof has yet to be depicted. *The main area to be strengthened lies in defining "legitimate business purpose" narrowly enough to keep the reporting agencies on guard lest they become passive partners in their subscribers' violations.* This the FTC can do without additional authority.

In dealing with governmental use of consumer reporting agencies, the FCRA attempted to distinguish between the legitimate requests of public officials and mere snooping. The law bravely states that government officials are permitted to obtain consumer reports under only two

174. Including cases where the information is to be used "in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status." FCRA, *supra* note 5, § 604(3)(D).

175. FCRA, *supra* note 5, § 604.

176. FCRA, *supra* note 5, § 607.

177. FCRA, *supra* note 5, § 620.

178. FCRA, *supra* note 5, § 619.

179. An example may be found in Appendix Five.

180. See, e.g., Ullman, *Liability of Credit Bureaus After the Fair Credit Reporting Act: The Need for Further Reform*, 17 VILL. L. REV. 44, 66 (1971); Note, *Protecting the Subjects of Credit Reports*, 80 YALE L. J. 1035, 1066 (1971); Note, *Protecting Privacy in Credit Reporting*, 24 STAN. L. REV. 550, 559 (1972).



circumstances: (1) When the information is to be used in connection with a determination of the consumer's eligibility for a license or other benefit, where the governmental agency is required by law to consider the applicant's financial responsibility or status;<sup>181</sup> or (2) Where the government has an "otherwise legitimate business need."<sup>182</sup>

Informal FTC staff opinions have thrown only limited light on what government purposes are legitimate. For example, *non-legitimate* purposes include governmental surveys or economic studies.<sup>183</sup> (Interviews were unable to ascertain how broadly the adjective "legitimate" is stretched in practice.) In all situations not covered by the two permissible purposes, the reporting agency is allowed to furnish government representatives no more than identifying information; *viz.*, the consumer's name, address, former address, place of employment, and former places of employment.<sup>184</sup>

Withholding information from non-legitimate recipients is the responsibility of the consumer reporting agency. The FTC staff has suggested that each government agent seeking information be required to complete a form certifying the specific purpose for which he seeks information and stating that the information will be used for no other purpose and be given to no other agency.<sup>185</sup> Whether this suggestion has been taken to heart could not be determined from the interviews conducted by the author, but there was general agreement among respondents that government usage of reporting agencies had substantially decreased.

Government agencies believed to have made use of consumer reports prior to the FCRA were invited to evaluate the impact of the new law on their work. Responses are reproduced in Appendix Six. In general, the responses indicate that the government agencies took affirmative action to avoid violation of the FCRA, that the FCRA has resulted in governmental investigations taking longer and costing the public more than in the past, and that alternative sources of information were developed to replace adequately the consumer reporting agencies.

#### E. PUBLIC RECORD INFORMATION

The Senate Report accompanying the Proxmire bill identified public record information as another area of abuse.<sup>186</sup> Most consumer reporting agencies either systematically compile records of such items as law

---

181. FCRA, *supra* note 5, § 604(3)(D).

182. FCRA, *supra* note 5, § 604(3)(E).

183. 4 CCH CCG, *supra* note 22, ¶ 11,304 at 59,786.

184. FCRA, *supra* note 5, § 608.

185. 4 CCH CCG, *supra* note 22, ¶ 11,306 at 59,799.

186. S. REP. NO. 91-517, *supra* note 51, at 4.



suits, tax liens, arrests, indictments, convictions, bankruptcies, judgments, and other publicly recorded data, or obtain such data on an *ad hoc* basis by sending their representatives to the courts. Public record items are often culled from newspapers or purchased from special sources such as the daily law reporters<sup>187</sup> or state motor vehicle departments.<sup>188</sup>

Except for "clean" motor vehicle records (MVR's), nearly all public record information finding its way into the personal information market is potentially adverse. Some of it is undoubtedly inaccurate or incomplete, largely because of the absence of mandatory satisfaction filings.<sup>189</sup> Newspaper clippings have a particular proclivity for causing problems because of incomplete identification of their subjects.<sup>190</sup>

The FCRA's approach to public record information reflects a compromise between Senator Proxmire's original intention of requiring the reporting agency to inform the individual whenever it received potentially adverse public record information and the industry's contention that such a control would force the reporting agencies to cease filing and reporting this highly relevant data.<sup>191</sup> On the theory that a consumer will be more seriously harmed if he loses a job or job opportunity due to erroneous or incomplete information than if he merely gets turned down for credit or insurance, the FCRA provided controls that are applicable only when public record information is used for employment purposes.<sup>192</sup>

Reporting agencies are given a choice in mode of compliance. Section 613 allows the reporting agency to (1) notify the consumer at the time a report is made that public record information is being reported for employment purposes, naming the recipient; or (2) maintain strict procedures to insure that all potentially adverse public record information is up-to-date and complete, reflecting the current public record status when it is reported. In practice, the first alternative is used less frequently because many employment-purpose investigations follow a policy of not contacting the subject.<sup>193</sup>

187. See profile of Chicago Law Bulletin, Appendix One.

188. See profile of Illinois Bureau of Motor Vehicle Services, Appendix One. The FTC staff has consistently taken the position that a state motor vehicle department is a consumer reporting agency under the FCRA. An official interpretation to this effect is expected. FTC News, Mar. 8, 1972; June 16, 1972.

189. See text at note 160 *supra*.

190. Computerization may reduce the amount of newspaper clipping by credit bureaus; Credit Information Corporation of Chicago, at least, dropped this activity when it went to computer. Interview with T.E. Sheahan, Vice President, C.I.C., Chicago, Jan. 25, 1972.

191. *Sullivan Hgs.*, *supra* note 37, at 147. The relevance of some items, such as arrests not followed by convictions, is certainly open to question.

192. FCRA, *supra* note 5, § 613.

193. Interview with Tom Linnen, Manager-Operations, Retail Credit Co., Chicago, Jan. 20, 1972.



Congressman Koch of New York has proposed an amendment to the FCRA which would require the consumer reporting agency both to notify the consumer when public record information is being reported, and to maintain strict procedures to keep the information up-to-date and complete.<sup>194</sup> The first leg of the proposal, notification whenever public record information is reported, is similar to the original Proxmire proposal and is susceptible to the same arguments of burden. *Maintenance of strict procedures to keep public record information up-to-date and complete, on the other hand, would appear to be a workable requirement for all reports, employment and otherwise.* Indeed, interviews left the impression that reporting agencies made no more than very minor changes in their procedures to comply with the "strict procedures" alternative in section 613. Once again, the real problem has rested not with the reporting agencies but with the public records themselves.

Because public records may not be up-to-date and complete, strict procedures on the part of a consumer reporting agency will not necessarily protect the consumer. Since the consumer himself is the only person who can say with certainty that a court record or newspaper article is accurate and complete, the ideal solution would be to require that he be interviewed prior to dissemination of any report containing such information. If we admit that this would be time consuming and expensive, with a pay-off in only a minority of cases, we should nevertheless follow out the logic which in section 613 created a separate requirement for public record information used for employment purposes. *Where public record information is to be furnished for employment purposes, the consumer reporting agency should be required to make a good faith effort to interview the subject of the report prior to dissemination.*<sup>195</sup>

#### F. OBSOLETE DATA

"Creditors obviously have a right to know if a person has had trouble in paying his bills. At the same time," Senate Report 91-517 said, "it can be unfair to burden a consumer for life with a bad credit record if he has improved his performance."<sup>196</sup> The growth of dossiers in the personal information market

creates a potential 'record prison' for millions of Americans, as past mistakes, omissions, or misunderstood events become permanent

---

194. H.R. 10434, 92d Cong., 1st Sess. (1971).

195. This proposal may create two problems. First, should some employment situations be exempted (e.g., where an employer suspects that a present employee is stealing, and wants an investigatory report without letting the employee know of the investigation)? Second, by increasing the burdens on employment reporting carried out by consumer reporting agencies, we may be inducing companies to do an increasing proportion of their own unregulated in-house investigations. See text at note 251 *infra*.

196. S. REP. NO. 91-517, *supra* note 51, at 4.



evidence capable of controlling destinies for decades. Out-of-date facts, such as previous political affiliations or nervous disorders, often go unrevised, and these can haunt a person's life.<sup>197</sup>

How long is a reasonable period in which accurate adverse information about individuals should be permitted to be retained in a credit file? The FCRA codified the voluntary industry guidelines of the Associated Credit Bureaus<sup>198</sup>—fourteen years for bankruptcy information and seven years for all other kinds of adverse information.<sup>199</sup> There is nothing inherently correct in the time limits chosen;<sup>200</sup> whatever limits are selected will necessarily reflect an arbitrary balancing of the consumer's privacy and commercial need.

It is difficult to imagine what kind of evidence might be adduced to support the proposition that the present standard is inappropriate. The main controversy (and a minor one at that) revolves around the question of whether a Chapter 13 Wage-Earner's Bankruptcy<sup>201</sup> should be considered a bankruptcy, and be reportable for 14 years; or an honest effort of a debtor to pay all his debts, reportable for only 7 years.<sup>202</sup> The FTC staff takes the position that wage-earner plans are not bankruptcies for purposes of the FCRA,<sup>203</sup> but as Appendix Seven indicates, consumer reporting agencies are not of one mind on this. *To promote consistency, a formal FTC interpretation is in order.*

Information which has become legally obsolete may be retained<sup>204</sup> but not used, except in connection with: (1) a credit transaction expected to involve a principal amount of \$50,000 or more; (2) the underwriting of life insurance reasonably expected to involve a face amount of \$50,000 or more; or (3) the employment of an individual at an annual salary of \$20,000 or more.<sup>205</sup>

Because of these exceptions, some reporting agencies see no reason to destroy data that is statutorily old; it might be needed for a future "high finance" report. To assure that obsolete data is not used illegally, however, procedures have been instituted to screen out-going reports.

197. A. WESTIN, *PRIVACY AND FREEDOM* 160 (1967).

198. ACB, *HOW TO COMPLY WITH THE FAIR CREDIT REPORTING ACT* 6 (1971).

199. FCRA, *supra* note 5, § 605(a). *c.f.*, § 605(b).

200. Mrs. Sullivan's House bill would have set 3 years for many items. H.R. 16340, 91st Cong., 2d Sess. (1969). This proposal would have created confusion by adopting different aging standards for different categories of information.

201. 11 U.S.C. § 1001 *et seq.*, providing that a wage-earner may have the option to file a plan for payment of his debts in full over a period not exceeding 3 years under court supervision.

202. See statement of Royal E. Jackson, Chief, Bankruptcy Division, U.S. Courts, *Sullivan Hgs.*, *supra* note 37, at 294.

203. 4 CCH CCG, *supra* note 22, § 11,306 at 59,791.

204. The Sullivan bill would have required that obsolete information be physically removed from the files. H.R. 16340, 91st Cong., 2d Sess. (1969).

205. FCRA, *supra* note 5, § 605(b).



This does not appear to be a problem area. Indeed, if Appendix Seven presents a fair sample, it may be concluded that the costs of storage outweigh the costs of purging old information and only a fraction of the total data is retained in-file for more than 5 years. Continued computerization promises to reduce even this amount.<sup>206</sup>

## G. INVESTIGATIONS AND PRIVACY INVASION

Senate Report 91-517 called attention to the pitfalls of gathering highly sensitive and personal information about an individual's private life, laying stress on the fact that such information is not only subjective, but is often of only marginal relevance to legitimate commercial needs.<sup>207</sup> While neither the Senate Report nor the FCRA defined what is meant by "highly sensitive and personal information" or "marginal relevance to legitimate commercial needs," it is clear from the hearing which preceded the report<sup>208</sup> that Congress was thinking primarily of the investigations carried out by the inspection bureaus and in particular their focus upon the characters, habits, and morals of applicants for insurance or employment. Before evaluating the effectiveness of the FCRA in this area, therefore, it will be necessary to supply a fuller background on the activities of the inspection bureaus.

### 1. *Theory and Practice of Insurance Inspections*

The purpose of insurance is to distribute on a regular and moderate basis the expected economic losses of an unknown few among many who are susceptible to the loss.<sup>209</sup> To succeed, an insurance company must be able to predict the extent and timing of the losses that may be sustained by the entire group covered. This requires establishing a "standard risk" which is representative of the degree of risk the firm considers "normal" for the class of policyholders it proposes to cover. "For probability theory to be applied in a realistic and useful manner

206.

Unlike old fashioned paper files, where storage is very cheap but selective removal of data is very expensive, in the case of the computer file, storage is very expensive and selective removal is very cheap. Storage costs can run as much as half of the total computer cost. Consequently, the storage of information which is old and outdated simply cannot be permitted.

Statement of Dr. Harry Jordan, TRW Information Services (now TRW Credit Data), *Sullivan Hgs.*, *supra* note 37, at 159. This is not to suggest that computerization presents no potential threat to privacy: the MIB file, described in the text at note 138 *supra*, is an example of how highly private, often subjective, data might be computerized. As Professor Miller observes, "Today's laser technology already makes it feasible to store a twenty-page dossier on every American on a piece of tape that is less than five thousand feet long." A. MILLER, *THE ASSAULT ON PRIVACY* 12 (1971). If, for example, Retail Credit Co. were to miniaturize and centralize its files, with computer retrieval, private information on 40 million citizens could be available immediately anywhere in the country.

207. S. REP. NO. 91-517, *supra* note 51, at 4.

208. See the hearings cited in notes 37, 48 and 68, *supra*.

209. FLINN, note 65 *supra* at 100.



by the individual firm, it is imperative that each applicant for insurance be evaluated in relation to the standards for acceptance adopted by that firm. This is the essential purpose of any underwriting inspection."<sup>210</sup>

In determining whether a particular applicant for insurance qualifies as a standard risk, information about that person is needed. In particular, it may be necessary to know about the applicant's physical condition, his attitude, his environment, and his heredity. These constitute what is known as the applicant's "personal hazard."<sup>211</sup> Where can an underwriter obtain this kind of information?

The most obvious source is the applicant himself; he provides most of the information needed when he fills out the insurance application. But the applicant wants his policy to be accepted, and at the lowest premium. He may lie. Or he may forget. Or he may tell only half a story, thinking it sufficient.

What about the agent? He represents the company and can provide information about the applicant, which he does. But the applicant may be his friend; and he does want to sell the policy. If he appears to be too probing, he might not be able to make his sales. So the agent, like the applicant, is not a sufficient source.

Other sources are possible. For physical information, there is the physician, either the applicant's or the company's or both. But the physician can say relatively little about the applicant's attitude (his character, habits and morals) or environment. For information about what other insurers have learned in the past, there are intercompany data banks. But what if the applicant is not already on record? What if the record is old or misleading?

For many years, insurance companies experimented with various ways of obtaining the extra, independent information they needed. Lawyers, consumer credit bureaus, mercantile agencies, commercial agents; these were tried, but found wanting.<sup>212</sup> By 1870, some insurance companies were using their own men to undertake inspections of applicants.<sup>213</sup> In 1901, Retail Credit Co. entered upon the scene as the pioneer independent insurance inspection service. By specialization, wide distribution, low cost standardized methods, and aggressive marketing, Retail

---

210. *Id.* at 102.

211. *Id.* at 95. The more accurately the underwriter can evaluate personal hazard, in theory, the better will be his company's loss experience, and the fairer the distribution of risks among insureds.

212. *Id.* at 160. Detective agencies were apparently never used for inspection reports, presumably because their services were too expensive.

213. *Id.* at 158. The Equitable Life Assurance Society appears to have been the first company to inspect its policyholders regularly, beginning in 1870. The decision to inspect applicants was made in 1892, when the Equitable reduced its contestability period to one year from issue. *Id.*



Credit Co. convinced the insurance companies that independent inspections were a key to sound underwriting. Today only a minority of insurance applicants--those under a particular age applying for less than a particular amount of coverage--are not inspected by Retail Credit Co. or one of its competitors.

The growth and shaping of the inspection bureaus reflected the needs of the insurance companies. These needs included (a) low cost per report, (b) speed of reporting, (c) standardization of reports, and (d) accuracy of information.

a. *Low Cost.* The standard inspection report in Chicago costs the insurance company \$5.25. For more penetrating investigations, where coverage will be extensive or where there is reason to believe that the subject presents an unusual risk, the inspection will be charged at twice or triple the standard rate. Open-ended investigations will be charged at an hourly rate, averaging \$10.50 in Chicago.

The capital requirements of an inspection bureau are minimal. The major items of expense are an office, preferably with telephone, desks and typewriters; file cabinets; and salaries for management, inspectors, and clerks. Low entry cost into the industry entices many inspectors with national bureaus to resign and open up their own independent bureaus. If they can develop contacts with underwriters and other insurance company management personnel, they may land orders for inspections sufficient to survive. The local independents have been most successful in dealing with the fire and casualty insurers. With market entry so easy, established bureaus are constrained to keep their prices low; indeed, at this writing, a number of newcomers in the Chicago market have cut prices and created a minor price war.<sup>214</sup>

Given this orientation to competitive pricing for the favors of the insurance companies, it is natural that inspectors will not be highly paid professionals. The following classified ad is symptomatic:

Male -- Misc. Employ.

### INSPECTORS

MAKING insurance and business reports.

No experience, minimum age 21 with car.

Earnings depending on production.

1313 SW 27 Ave.<sup>215</sup>

To qualify as an inspector, one must generally have a high school diploma, a car, and an ability to get along with people. Some inspection

214. Interview with William Dorf, President, Illinois Service Bureau, Chicago, Dec. 18, 1972.

215. Miami Herald, April 24, 1972, at 28-C. The address is Retail Credit Co.'s Miami office.



bureaus also require typing skills, but the trend in recent years has been for the bureau to provide secretaries.

"Earnings depending on production." While there are variations from one inspection bureau to the next, the general structure of the industry relates an inspector's salary to his production. Either directly or indirectly, this means that the inspector receives a percentage of the selling price of each report he prepares.<sup>216</sup> Furthermore, the inspector's commission may be based on a set "quota" of reports made by him. If the quota is surpassed, a bonus is paid.<sup>217</sup> If the quota is not met, the inspector will be reprimanded and may ultimately lose his job. Most inspectors receive per mile travel expenses.

A new inspector usually receives some training, often in the nature of on-the-job exposure to the methods of senior inspectors. The amount of training varies greatly among the inspection bureaus. When an inspector is fresh to the job, he is only expected to complete 12-14 reports a day. An experienced inspector is expected to handle as many as 24 reports a day. When an inspector is sent out to prepare reports on consumers living in rural areas (referred to as being "on circuit"), he might obtain the information for 40-60 reports in a single day.<sup>218</sup> In short, the inspection industry is structured so that each inspector produces the maximum possible number of reports. That this is economically efficient seems clear; whether it results in a conflict with another insurance company need, *accurate* information, is a matter yet to be weighed.

b. *Speed.* There are two main reasons why the insurance companies desire speed of reporting from the inspection bureaus. First, the longer it takes to approve an application, the greater the possibility that the potential insured will change his mind or take his business elsewhere. Second, the premiums don't come in, and coverage doesn't begin until the inspection report has been received and the application evaluated.<sup>219</sup> Delay, therefore, doesn't serve either the company or the applicant.

---

216. Inspectors say that their average portion is about 40%, or \$2 on a \$5 report. Inspectors earn, they say, between \$400 and \$800 a month.

217. Determined by the percentage base applied to the number of reports in excess of the quota. The possibility of this type of bonus is another incentive to produce the maximum number of reports.

218. Figures in this paragraph were offered in testimony by two former Retail Credit Co. inspectors in *Retail Credit Co. v. Derryberry*, note 96 *supra*. The manager of the Oklahoma City Retail Credit Co. office testified that the experienced inspector would average 16 to 18 reports per day. *Id.* Congress had been informed by Retail Credit Co.'s president that the average is around 12 reports per day. *Sullivan Hgs.*, *supra* note 37, at 503. In speaking of averages, one should keep in mind that inspectors are called upon to make many different kinds of reports under varying circumstances, and that at least some of these reports can easily be made in a few minutes. *Id.*

219. There are exceptions. *E.g.*, automobile insurance is often available to apparently good risks "on binder," pending the outcome of inspection.



Fast service is related to the production quota system. Having to complete as many reports as possible, the inspector cannot dawdle. At the "average" inspection bureau, the inspector is given a batch of order tickets when he arrives at the office in the morning. The manager (or in a large bureau, a supervisor) has already segregated the in-coming order tickets by geographic area so that an individual inspector can limit his range for the day. The manager has also run the order tickets through the files, to see if the subjects have been previously inspected or if there is any public record information, and if so, whether it is legally obsolete. The inspector reviews any files that were found for leads, plans his route, and leaves for the field. In most cases, he won't return to the office until the following morning, or perhaps even several days later, depending on the size of his batch of order tickets and how far away his inspection areas are. A few bureaus deal with their inspectors almost entirely through the mail. This is particularly true in the instance of part-time fee inspectors ("correspondents") who are located in areas far removed from inspection bureau offices.

Once the inspector has left the office he is on his own. The hours he keeps are his business, and in fact many inspectors have to work at night or on weekends to locate sources at home. The inspector is supposed to interview at least two sources on each report, and seek additional confirmation where there is derogatory information.<sup>220</sup> In the majority of inspections for insurance purposes, the applicant himself or an adult member of his family will be one source. Prior to the FCRA, there was a certain amount of hesitancy in approaching the applicant, and the Retail Credit Co. Inspector Manual instructed:

Interviews should be avoided: (1) when we have in file or develop on preliminary investigation information on habits, morals, or reputation which is sufficiently serious to probably cause rejection; (2) when the agency situation is serious; (3) when a customer requirement prohibits.<sup>221</sup>

Now that the FCRA gives the subject access to the file, the inspection bureaus are less reluctant to interview the subject of a report. A 1972 revision to the Retail Credit Co. Life and Health Manual speaks of the advantages to be gained by a direct interview:

- \* Applicant's identity can be conclusively established.
- \* His physical appearance can be observed as well as his manner of living and environment.

---

220. Retail Credit Co. *Inspector Manual* 31, page dated Oct. 1967.

221. *Id.* at 48, page dated June 1964.



- \* Information regarding health, habits, drug use, arrests, and driving record can be obtained.
- \* Leads for further investigation can be secured.<sup>222</sup>

Nevertheless, the revision still sets out reasons to avoid interviewing the subject, including (1) the inquiry instructs "Do Not Interview," and (2) "The possibility exists that the applicant may be disturbed by our investigation (he was disturbed by a previous handling, or we have a tip from file or the agent that we should avoid an interview unless absolutely necessary)."<sup>223</sup>

With the stress on production and speed, it is inevitable that inspectors sometimes cut corners. According to the inspection bureaus this is most rare, but according to former inspectors interviewed it happens regularly. One informant estimated that the inspector departs from the manual 10% of the time in city inspections, and much more often when "on circuit." According to the inspection bureaus, the reason why the former inspectors interviewed think corner-cutting is common is the same reason these inspectors are "former."<sup>224</sup>

There are several well-tred avenues of corner-cutting. Instead of interviewing two sources and confirming all derogatory data, the inspector may interview only one source. (One former inspector confided that he had on several occasions seen other inspectors create sources and information out of air.) Instead of street investigations, the inspector may rely heavily on the telephone. Instead of using old information ("O.I.") from the file as a lead, the inspector may rely on the file as his sole or substantial source. Stock informants,<sup>225</sup> such as bankers, service station attendants or grocery store managers may be relied on, particularly in rural areas, even though their knowledge of a particular consumer may be highly tenuous. Public records may be entirely overlooked.

---

222. Retail Credit Co. *Life and Health Manual*, page E-2, 1972.

223. *Id.*, Retail Credit Co.'s revised *Automobile Reports Manual* states: "A direct interview should be attempted on every Automobile Report whenever not specifically prohibited by a customer overprint." Page C-17, dated June 1972. The increased willingness to confront the subject of a report, seen in the cited revisions, must be considered an important effect of the FCRA.

224. It was not possible to obtain information from inspectors presently employed by the nationals. This, say former inspectors, is because the nationals have power to blackball a former employee from future employment. The sources most impressive to the author were inspectors and managers presently employed by local independent bureaus who had previously worked for the nationals.

225. Retail Credit Co. utilizes a file which "lists informants who are in a logical position to give information on a group of people and who have been interviewed quite frequently and are therefore cognizant of our business and what we want." But, inspectors are told, "Some business houses have a rule that no information whatever is to be given out on employees. When this occurs, get the point up to the Manager, who will determine whether it is desirable to attempt to get a regular informant at the plant or place of business." Retail Credit Co. *Inspector Manual*, 33, revised in 1970 to change the word "informant" to "source."



In sum, although there is no evidence available as to how frequently corner-cutting occurs, it is impossible to avoid the conclusion that official inspection bureau policy and actual inspector behavior do not always remain in close joint.<sup>226</sup> This does not necessarily imply that consumers are injured by corner-cutting; in fact, it is reasonable to assume that a cheating inspector would not invent derogatory information, because this would be likely to be challenged and a cycle begun which would lead back to the inspector. The problem arises, more probably, from situations where time pressures lead the inspector to accept derogatory information without sufficiently checking it out. A certain amount of error, sloppiness, and unverified gossip is likely to enter any inspection system which requires an investigator to average over 15 reports a day,<sup>227</sup> with a minimum of two sources per report; where the investigator must locate sources (sometimes situated over a large geographic area), must convince the sources to talk about matters that are sometimes highly personal and subjective, and must put interview notes into shape for the report.<sup>228</sup>

c. *Standardization.* To satisfy the insurance companies' need for low-cost, speedy reporting for a variety of lines of insurance, the inspection bureaus have developed a high degree of standardization in their procedures. This is reflected in the fact that each line of insurance is reported on a separate form, each form containing questions deemed important for the particular underwriting needs.<sup>229</sup> In gathering his information, the inspector has merely to ask the questions in the order they appear on the form. Because the forms are drawn to meet the needs of underwriters, they tend to be similar from one company to another. A few independent inspection bureaus have experimented with departures from the norm; for example, they have deleted from their automobile inspection reports all questions regarding the applicant's character, habits, and morals.<sup>230</sup>

Other manifestations of standardization may be found, especially in the national inspection bureaus, where inspectors fill out daily production sheets listing the number of reports made and the amount

---

226. For litigation involving inspector foul-ups, see: *Bartels v. Retail Credit Co.*, 185 Neb. 304, 175 N.W.2d 292 (1970); *Atwell v. Retail Credit Co.*, 431 F.2d 1008 (4th Cir. 1970); *Peacock v. Retail Credit Co.*, 302 F. Supp. 418 (N.D. Ga. 1969); *Copley v. Northwestern Mutual Life Ins. Co.*, 295 F. Supp. 93 (S.D. W. Va. 1968); *Wetherby v. Retail Credit Co.*, 201 A.2d 344 (Md. Ct. App., 1964); *Wagner v. Retail Credit Co.*, 338 F.2d 598 (7th Cir. 1964); *Petition of Retailers Commercial Agency, Inc.*, 174 N.E.2d 376 (1961); and *Weinrich v. Retail Credit Co.*, 186 F. Supp. 392 (W.D. Pa. 1960).

227. See note 218 *supra*.

228. Mechanisms for control are described in the text following note 231 *supra*.

229. Examples are found in Appendix Eight.

230. A few insurance companies are experimenting with automobile inspections that don't involve these subjects. Such inspections usually imply a skimming of the better risks in the market. Results of such experiments were not yet available.



of "significant" (also called "protective") data which they have uncovered. These sheets form the basis for a highly systematic evaluation of the work of individual inspectors, and allow comparisons to be made between branch offices and even between competing inspection bureaus.

d. *Accuracy.* Insurance companies naturally want the information they receive to be accurate and complete. If it is not, the wrong underwriting decisions will be made and the inspection reports will not be serving a useful purpose. The main area for concern, however, is not that too much derogatory information will be supplied, but too little. That is, if inspectors are not doing their work, they are more likely to err on the consumer's side, so that there is little chance of being caught.

To counteract this possibility, great stress is placed on the production of "*significant data*," information which might lead to declinations or rate-ups. Examples from Retail Credit Co. Form 930 (Significant Feature and Inquiry Control) include "bankruptcy," "bad driving reputation," "youthful driver in family," "driving violations," "going into Navy," "topless dancer," "polio, age 25," "high performance car," "husband's driver license suspended," and "girl crazy--D student."

Some, but not all, inspection bureaus keep close statistics on significant data production. By trending from the past, they know how much significant data an inspector would normally produce if he were doing an honest and efficient job. These norms are made known to the inspectors and become in effect--according to former inspectors--a quota. Failure to meet the quota without good reason leads to reprimand or dismissal.

The inspection bureaus deny that they use a quota system for significant data, but internal documents, as well as the information provided by former inspectors, indicate otherwise. For example, Retail Credit Co. supplied its employees a booklet titled "Objectives 1970," which opens with a note from a company vice president saying, "I encourage you to keep and use this booklet... Nowhere else will you be able to compile as much important information to help you understand the goals of your company." The booklet shows the company's average percentage of cases with significant information for various insurance lines (e.g., automobile services, 52.3 per cent; life and health services, 17.4 per cent) and gives the latest statistic for the local office, together with the objective. The booklet also provides figures on below-standard underwriting and below-standard operating, where reports have been found to suffer from various deficiencies.



Significant information is also used in competition between inspection bureaus for insurance company contracts. A Retail Credit Co. internal letter to California managers stated that an account with the American National Insurance Company had just been won back from the American Service Bureau as a direct result of developing more protective information than the competitor.<sup>231</sup>

The inspector, then, is faced with two important pressures: he must produce a large number of reports, and he must produce a given quota of significant information. To minimize the hazards of this situation, the inspection bureaus build in certain production controls. The work of inspectors is under periodic review to see if the reports "ring true." Occasionally a second inspector is sent out to interview sources already interviewed, for the purpose of exposing discrepancies. If an underwriter notes a conflict between an inspection report and other information available to him, he will contact the inspection bureau, and an explanation will be sought. Finally, with the FCRA in effect, mistakes will be brought to light by the report subjects themselves.

Whether these various protections are sufficient is a matter requiring more evidence than is now available. The impression gained from many interviews is that the adequacy of production controls varies greatly from one bureau to another and between the various branch offices of a particular bureau.<sup>232</sup> A key variable appears to be the skill and integrity of each office manager.

## 2. *Personnel Reporting by Inspection Bureaus*

Expansion of the national inspection bureaus into the field of employment reporting was natural. Where else could employers gain information about a potential or present employee's character, habits, morals, and reputation for such a reasonable price?

Retail Credit Co. moved into employment reporting rather slowly, beginning in 1901 or 1902 as an aid to the insurance companies in their selection of agents and medical examiners.<sup>233</sup> From the standpoint of sales volume, however, personnel reporting didn't become important until the beginning of the Second World War. "As early as 1940, the desire to employ only persons loyal to the principles of Democracy

---

231. Letter of Oct. 27, 1971 from the Regional Vice President.

232. Mistakes have been known to happen even in cases where large policies are involved. *E.g.*, United Family Insurance Company has sued Retail Credit Co. for \$8 million, charging that it was misled by an inspection report into issuing \$15 million worth of life insurance to an Oklahoma rancher. *Atlanta Journal*, June 19, 1972. Apparently, the inspection greatly overstated the rancher's worth, obtained figures on the size of his ranch from an erroneous newspaper clipping hung on a wall as a joke, and neglected to mention a variety of suspicious circumstances about the rancher's life. The rancher was mysteriously murdered one year after the insurance was drawn. *Wall Street Journal*, Nov. 23 and 24, 1971, both at 1, col. 1.

233. FLINN, note 65 *supra*, at 289.



induced the Lockheed Aircraft Manufacturing Corporation . . . to utilize the facilities of the Retail Credit Company."<sup>234</sup>

Prior to 1940, the company had maintained a policy of reporting on applicants only, but, William A. Flinn relates, "Because of the conflicting ideologies fired up by the impending conflagration of total war, the firm's policy was amended to permit the making of reports on present employees of armament manufacturers."<sup>235</sup> Today, employment reporting accounts for about 15 per cent of Retail Credit Co.'s reports.<sup>236</sup> "Very few" employment reports are made to employers on present employees.<sup>237</sup> For the other national inspection bureaus, the percentage of reports made for employment purposes is generally much smaller, and in absolute terms, no inspection bureau approaches Retail Credit Co.'s 6 million a year.<sup>238</sup>

Personnel reports are sold to a variety of industrial, commercial, financial and insurance companies, and cover education, job history, employment experience, character and skills. They may go beyond this. Retail Credit Co. lists 16 different types of personnel report, some of which are full-scale detective-type investigations. One example is the "personal progress report."

The personal progress report is drawn on one who is presently employed. The inspector is warned not to interview either the subject or his present employer. According to a Retail Credit Co. solicitation,

These Reports provide investigations of the standing of the employee as a citizen, his civic and other community activities, records as to payment of bills, and personal finances. This type of investigation is suggested on employees under consideration for promotion or for transfer in position or location; for periodic checks of employees, especially those at detached locations seldom visited; when disturbing rumors concerning an employee are circulated, or in any situations requiring full investigations.<sup>239</sup>

---

234. *Id.* at 293.

235. *Id.* at 294.

236. Letter from Henry A. McQuade, Retail Credit Co., to U. CHI. L. REV., Feb. 23, 1972. To understand the perceived need for employment reports, see Walsh, *The Case for Applicant Investigations*, in BUSINESS AND INDUSTRIAL SECURITY: PRACTICAL LEGAL PROBLEMS (2d ed., 1972), where it is related that in a study of over 6,000 employment applicants, highly skilled investigators found that 1 in every 7 who had been considered suitable for hire turned out to have had an unfavorable background.

237. McQuade letter, *supra* note 236. In Chicago, about 33% of Retail Credit Co.'s disclosures arise from personnel reports. *Id.*

238. Figure relies on McQuade's 15% estimate, *Id.*, applied to 40 million annual reports. Listing Application to New York Stock Exchange, A-30695, Mar. 1, 1971. Personnel reporting fluctuates with the state of the economy, and in 1971 accounted for only 6% of Retail Credit Co.'s volume. 1971 Retail Credit Co. Annual Report, 7.

239. Retail Credit Co. Brochure titled *Personnel Reports for Better Selection of Personnel* (1966).



The report is charged at an hourly rate. The investigator is directed to describe, among other things, "marital status, domestic life, personal reputation, habits, morals, and type of associates. Careful attention to personal standing in the neighborhood and community; whether popular, well-liked, or disliked. Describe membership and extent of participation in any civic, social or fraternal organizations. Cover other leisure time activities."<sup>240</sup>

### 3. *The FCRA and Investigations*

Recognizing that inspection bureaus were in important ways different from credit bureaus, Congress created the concept of the *investigative consumer report*<sup>241</sup> to deal with reporting that involves personal interviews. Investigative consumer reports are subject to the same requirements as regular reports, with two additional provisions. First, under section 606 of the FCRA, when a person procures an investigative consumer report he must disclose to the consumer within three days that the report is being made, and must inform the consumer that he is entitled to request a further disclosure of the nature and scope of the investigation. There is one exception: pre-notification is not necessary when the report is to be used for employment purposes for which the consumer has not specifically applied. Second, under section 614, a consumer reporting agency may not include adverse information in an investigative report drawn from a previous report more than three months old, unless the agency first verifies the information.

Pre-notification is achieved in three different ways. Some insurance companies and employers incorporate a pre-notification of investigation in their application forms. Others supply their agents or hiring personnel with pre-notification letter which can be personally presented to the applicant.<sup>242</sup> Finally, some insurance companies mail the pre-notification letter to the potential insured after the insurance application has been received by the company from the agent.

The last method is sometimes used as an alternative, at the choice of the agent, when the agent believes that mention of an impending investigation may block his sale.<sup>243</sup> This is legal, so long as the insurance company delivers the pre-notification within three days after the inspection report is requested. The procedure makes clear, however, that the existing pre-notification provisions do not necessarily allow a consumer to exercise knowing consent to an investigation. Indeed, if matters are

---

240. *Id.* Sample forms for personnel investigations appear in Appendix Eight.

241. See note 102 *supra*.

242. See Appendix Nine.

243. Interview with John Mauck, Insurance Broker, Jan. 6, 1972.



moving efficiently, an investigation can be completed before the consumer even knows that his application entails an investigation. *To assure knowing consent, the FCRA should be amended to provide that the consumer be apprised of a possible investigation at the time he applies for insurance, employment, or credit, where the application normally entails an investigation.*

Even where pre-notification comes at a time when the consumer still has an opportunity to decide that he does not wish to trade his privacy for the benefit applied for, the FCRA provisions do not provide adequate information for the consumer to exercise knowing consent. The prenotification does not describe either the investigation's objectives or methods in any detail.<sup>244</sup> If he desires more information, the consumer must make a written request "within a reasonable period of time."<sup>245</sup> The follow-up letters used by most insurance companies upon receipt of a request for further information provide very little additional illumination.<sup>246</sup> *To allow the consumer to exercise knowing consent to an investigation, the FCRA should be amended to require the party requesting the investigation to supply the consumer, prior to the investigation, with the standard form used by inspection bureaus or other consumer reporting agencies in reports of the kind normally prepared under the circumstances of the consumer's application.*<sup>247</sup>

The FCRA seems to be particularly weak in the area of employment reporting. Pre-notification is not required if the subject of the report has not specifically applied for an employment action.<sup>248</sup> This obtains in four situations: (1) Where a potential employee has not been approached by the employer (e.g., an executive search organization scanning a number of possible candidates for a job); (2) Where incumbent employees are being reviewed pursuant to a periodic program; (3) Where an employee is being considered for promotion, although he hasn't applied for promotion; and (4) Where the employer suspects his employee of embezzlement or some other impropriety. It seems anomalous that employers may obtain investigative reports on an individual who has

244. See Appendix Nine.

245. FCRA, *supra* note 5, § 606(b). One underwriter estimated that 10% of the potential insureds request further information.

246. See Appendix Nine.

247. Two objections might be raised to this proposal. First, the consumer report user might not know at the time of the application whom he will hire for the investigation. This does not seem important, however, because the standardized reports developed by the reporting agencies for various purposes are sufficiently similar that, for example, if the consumer applied for life insurance, it wouldn't matter whether he saw the Retail Credit Co. form or the American Service Bureau form. Second, if the consumer knows ahead of time what the investigation is looking for, he will be in a position to make sure the report turns out well for him. This may be true, but why bother with any pre-notification at all if the purpose is not to put the consumer in a position where he can make reasonable choices about the relinquishment of privacy?

248. FCRA, *supra* note 5, § 606(a)(2).



not applied for employment when a creditor may not obtain less objectionable types of reports on individuals who have not applied for credit.<sup>249</sup>

In non-notification investigations of the above type, the consumer may lose a valuable job without ever learning that he was investigated. This could happen because (a) the subject is often not interviewed in employment-purpose investigations, (b) other informants are often asked not to mention the investigation to the subject,<sup>250</sup> and (c) once the consumer reporting agency has met its obligation of ascertaining that the consumer report user has a legitimate purpose, there is no one looking over the employer's shoulder to see to it that he meets his obligation of adverse action notification under the FCRA. There is no way of knowing how frequently abuse occurs in this area, but the potential loophole is large.

Perhaps the loophole could be plugged by amendment to the FCRA, but no important gain would be registered unless a more gaping hole were plugged first. This is the problem of the "in-house" investigation. Employment investigations are often handled by a corporation's internal personnel or security department.<sup>251</sup> These are not consumer reporting agencies under the section 603(f) definition because they do not furnish reports to "third parties."<sup>252</sup> It makes no sense in terms of an employee's privacy that the degree of informational control to which he is entitled depends upon the technicality of whether an investigator is paid by the employer directly or through the intermediary of a third party. *Legislation must be fashioned to protect all employees equally.*<sup>253</sup> So long as in-house investigations have special privilege, any move to tighten controls on consumer reporting agencies will only lead more employers to create their own internal security divisions.

Before leaving the subject of employment reporting, one additional ambiguity in the FCRA should be mentioned. Suppose an inspector decides, whether out of laziness or because he has not been successful in his attempts at a face-to-face interview, to obtain information from an employer through use of the telephone. Is this an investigative

---

249. The author is grateful to James A. Ambrose, Vice President of Consumer Trends, Inc., for his lucid expression of this thought in a letter to U. CHI. L. REV., Jan. 11, 1972.

250. See, e.g., Retail Credit Co. *Inspector Manual* at 37, page dated June, 1964.

251. Industry sources suggest that a trend toward in-house investigations has been enhanced by the FCRA because of the necessity for disclosure when consumer reporting agencies are involved.

252. A similar in-house problem exists with regard to inspection reports prepared by the Equitable Life Assurance Society's internal inspection division. The Equitable takes the position that these reports are covered by the FCRA, (letter from Paul H. Patterson, Regional Inspection Manager, to U. CHI. L. REV., Nov. 14, 1972), but a court might not agree.

253. Such legislation may have to consider certain exceptions; e.g., where pre-notification of an investigation might make it impossible to uncover evidence of a suspected crime.



consumer report? The definition in section 603(e) speaks of "personal" interviews. Is a telephone conversation a personal interview?

The question is not easily passed over for two reasons. First, because credit bureaus frequently obtain information by telephone, often in the form of direct reports. Must pre-notification be given? Second, because Credit Bureau Reports, Inc. is planning to enter into competition with the inspection bureaus, using a system whereby credit bureau employees would be trained to obtain the kinds of information by telephone which are presently obtained through face-to-face interviews by inspectors.<sup>254</sup> Presumably, if the telephone conversation elicits information about the consumer's "character, general reputation, personal characteristics, or mode of living,"<sup>255</sup> it is an investigative consumer report. But to bring certainty, *the FTC should make a formal interpretation that the words "personal interview" in section 603(e) include telephone interviews.*

In evaluating the impact of the FCRA on investigative consumer reporting, three questions should be asked. First, has the new law fostered more accurate and complete records? Second, has it changed methods of information collection to the enhancement of privacy values? And third, has it reduced the flow of what one writer has described as "informational communication that--however accurate and complete--reports facts that cannot decently be retailed?"<sup>256</sup>

To the first question, the answer is a qualified affirmative. The FCRA has provided a mechanism whereby the consumer can confront and challenge damaging information. By bringing the inspection bureaus out from behind their curtain of secrecy, by giving them protection from tort actions in return for opening up their files to consumers, by making them more willing to approach the subject of the report for information, by reducing somewhat the indiscriminate use of old information already in file, and by giving the consumer the opportunity to learn what is in his record and have it changed if it is wrong, the FCRA has undoubtedly been a force for accuracy of records. Nevertheless, that improvements can be made within the framework of the FCRA, should be clear from the foregoing pages.<sup>257</sup>

Has the FCRA changed the methods of information collection? There have been a few changes. For example, with the possibility of disclosure to a consumer an inspector's reporting errors are more likely

254. Plaintiff's brief, note 46 *supra*.

255. FCRA, *supra* note 5, § 603(e).

256. Lusk, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693 (1972).

257. For personalized examples of the FCRA's weaknesses, see Shaefer, *Consumers Gripe That Credit Reporting Law Doesn't Always Work*, Wall Street Journal, Dec. 29, 1971; Auerbach, *Credit Probers: Consumers Past Still Fair Game*, Los Angeles Times, Aug. 22, 1972.



to get back to the inspector, forcing him to be more careful. The increased likelihood that the subject of the report will himself be interviewed marks another change. However, the one sentence which was repeated over and over in interviews was this: "We're not doing anything differently now from the way we were doing it before the FCRA." This response may seem curious because in many ways it is untrue. In a fundamental sense, however, it is true: the FCRA has done nothing to restructure the industry.

Yet, there lurks in the FCRA a passage which creative public administration could read as a lever for basic change. The passage is section 607(b):

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

An unofficial FTC staff opinion has interpreted this section to imply the need for adequate training of personnel, verification of adverse information by more than one source, and an end to quotas for the development of adverse information.<sup>258</sup> *If the FTC had rule-making authority,*<sup>259</sup> *section 607(b) could become a tool for the restructuring of the inspection industry; lacking that authority, the FTC can nevertheless move in that direction by the process of making formal interpretations of the phrase "reasonable procedures."*<sup>260</sup>

Finally, has the FCRA limited the reporting of facts which "cannot decently be retailed"? The simple answer is *No*. The FCRA made no attempt to control the subject matter of investigation. Character, habits, and morals are still standard reporting material. A person's drinking problems, sex life, health history, political beliefs, reputation, and associates are still fair game. Inspection bureaus remain the bargain basement detectives, the purveyors of hearsay, which they have always been.

In fairness to the inspection bureaus several things should be said. First, hearsay itself carries connotations from the courtroom which are not quite as appropriate in the commercial world. Everyone makes decisions based on hearsy, and the difference between A asking B about C and A paying D to ask B about C is not terribly great. The additional step may depersonalize the inquiry and may create new possibilities for error, but it doesn't change the nature of the communication. The

258. 4 CCH CCG, *supra* note 22, § 11,306 at 59,791.

259. Other than to promulgate "procedural rules", the F.T.C. has no rule-making power. FCRA, *supra* note 5, § 621(a).

260. For an indication of what might be reasonable procedures, see text preceding note 291 *infra*.



change occurs not when the third party intercedes, but when his report becomes a filed dossier available for future use. However, the future use of the dossier can be limited, which is one of the FCRA's objectives. The dossier could be required to be destroyed, but then the subject would never be able to confront damaging information. In a sense the files represent a bureaucratization of hearsay which serves the individual, if properly controlled, by giving him a handle over communications which might otherwise be too ephemeral to grasp, and therefore impossible to defend against.

Second, the inspection bureaus are not made up (as some of the more lurid episodes in their history might otherwise suggest) of evil, insatiably curious gumshoes. The inspectors are very much like other middle-class individuals, just doing a job. If the job requires snooping into sensitive personal information blame should be placed upon the master, not the servant, and in this case that means the insurance companies. But the insurance companies themselves are just doing a job--attempting to distribute risks in a fair fashion to themselves and the consumer public.

The public can call off the inspectors, but presumably not without paying an economic price. "Presumably" is used because information is not available which would allow the public to estimate the cost in additional premiums of "characters, habits, morals" inspections were eliminated. The underwriters say this information is "relevant," and so it is. The question which must be asked is, how relevant in terms of dollars and cents? If it costs more for an individual to retain privacy, he should be given the choice of paying the price. The worst fault of the present privacy-invading structure is that an individual is given no alternatives which make practical sense.

A third point about inspection bureaus which might otherwise be overlooked is that the inspection bureaus perform many useful services for the insurance companies which have little or no bearing on privacy as it is usually understood. A reading of the report forms in Appendix Eight will reveal that, at least in the property lines of insurance, investigation of character, habits, and morals is of relatively small importance compared to the objective types of information collected.

In the final section of the paper we turn attention to the future. What are the strategies of reform; i.e., how can privacy be protected in the personal information market?



### III. *PROTECTING PRIVACY IN THE PERSONAL INFORMATION MARKET*

Without the refuge of privacy, creativity is displaced by dogmatism, spontaneity by behavior for the record and autonomy by the overwhelming sense of powerlessness. The neighbor becomes a potential informer, the acquaintance at the workbench, a hazardous confidant. Without legal power to know what is being said about him, to find and confront the faceless bearer of tales, without the right of privacy, in short--the only refuge is in radical orthodoxy.

From a Speech by Edward F. Ryan,  
Counsel to the Ontario Law Reform Commission

A universally accepted definition of privacy does not exist. We can all agree with Brandeis, however, that privacy has to do with being let alone, with not having one's autonomy invaded except by invitation. Whatever else it may mean, privacy implies an ability on the part of the individual to control at least certain kinds of information about himself.<sup>261</sup> Privacy can rarely be absolute, of course, because individuals lead social lives, and society needs information about its members in order to function. But the needs of society can be balanced against the need for autonomy and individuality, and a working definition of privacy can be arrived at. The precise balance will reflect the institutions, traditions, and values of a particular society at a particular time. In any society, however, certain kinds of information will be considered so personal, so private, that they will be treated with special privilege; habits and institutions will develop to protect this personal information from uses which the society deems indecent.

Perhaps the United States in 1972 has reached the type of equilibrium situation described, where the society (whatever that means precisely) has accomplished its balancing process and has determined that an acceptable working definition of privacy will permit millions of investigations each year where friends, neighbors, associates, and commercial acquaintances will be asked questions about an individual's character, his drinking habits, his sex life, his political beliefs, his health, his finances, his associates, and his attitudes. Certainly, there are surveys which indicate that large majorities approve of credit, insurance, and employment investigations.<sup>262</sup> But it is not clear from the

---

261. "Privacy," Professor Westin says, "is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." A WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

262. *E.g.*, the Opinion Research Corporation's study commissioned by Retail Credit Co. in 1972 showed, among other things, that only 11% of a sample of the American public feels strongly that something should be done about the invasion of privacy.



surveys that the respondents were informed about either the quantity or the quality of investigations, and it may be that the surveys indicate no more than an abstract understanding that certain types of decisions ought to be based upon information rather than guesswork. If we make the optimistic assumption that there is a latent support--nourished in traditional American attitudes that are both liberal and conservative--in favor of protecting a larger degree of privacy than is presently protected, what changes should we seek?

#### A. *FTC FORMAL INTERPRETATIONS OF THE FCRA*

We can start the process of tightening controls on the personal information market by suggesting that the Federal Trade Commission use its existing power under the FCRA to issue formal interpretations of the law that will give the FCRA its fullest play. Several such interpretations have been suggested during the course of this analysis:

1. Chilling identification forms and waiver agreements violate the intent of section 610 by discouraging consumers from seeking disclosure of their records.<sup>263</sup>

2. The definition of medical information in section 603(i) implies that medical information can only be withheld from a consumer if it was originally obtained with the consumer's knowing consent.<sup>264</sup>

3. In deciding whether to honor a request for information, a consumer reporting agency must determine in each case whether the potential report user's purpose is legitimate. The FTC should define the term "legitimate business need", found in section 604, in a narrow fashion, giving specific examples of what practices do and do not qualify.<sup>265</sup> This is of particular importance with regard to governmental requests for information. No government need ever risk the political embarrassment involved in spying on its citizens when it can achieve the same thing by becoming a client of a private corporation like the Retail Credit Co.

4. The word "bankruptcies" in section 605, pertaining to obsolete information, does not include wage-earner proceedings under Chapter 13 of the Bankruptcy Act. Such proceedings are more in the nature of suits and judgments, and should only be reportable for 7 years.<sup>266</sup>

---

<sup>263.</sup> See text following note 110 *supra*.

<sup>264.</sup> See text following note 149 *supra*.

<sup>265.</sup> See text following note 180 *supra*.

<sup>266.</sup> See text at note 201 *supra*.



5. The words "personal interview" in section 603(e), defining an investigative consumer report, should include telephone interviews.<sup>267</sup>

6. The FTC should set forth with detail what it considers to be "reasonable procedures to assure maximum possible accuracy," as required by section 607(b).<sup>268</sup> Examples of procedures that might be included will be suggested below.<sup>269</sup>

#### B. AMENDMENTS WITHIN THE IMMEDIATE FRAMEWORK OF THE FCRA

Going beyond formal interpretations by the FTC, the FCRA itself needs to be strengthened in many ways. Most of the following suggestions were developed in the course of this analysis:

1. Adverse information notifications should be in writing. They should include a brief summary of the consumer's legal rights under the FCRA. Additionally, they should include an explanation for the report user's decision to take adverse action. This could be achieved by a check-off list of common reasons.<sup>270</sup>

2. At least one credit bureau has demonstrated that adequate disclosure can be achieved by mail, as well as by personal interview or telephone. This should be permissible, provided all terms and codes are put into lay language, and a contact person is identified in case further explanation is required.<sup>271</sup>

3. The medical information exception in section 609 should be replaced by a permissive provision allowing the consumer reporting agency to make disclosure of medical information to the consumer's physician rather than directly to the consumer, provided that the consumer is informed that there is medical information in the file which is being withheld, and that this information will be disclosed to a physician designated by the consumer.<sup>272</sup>

4. All investigative consumer reports should be reduced to writing and retained on file for at least one year. Sources of investigative consumer reports should be identified and retained on file for the same period of time, but should not be identified in the actual report or retained copies. Investigative consumer reports should be disclosed to the consumer by allowing the consumer to read the report copy and by having a trained person disclose the nature and substance of any other

---

267. See text at note 255 *supra*.

268. See text at note 260 *supra*.

269. See text preceding note 291 *infra*.

270. See text at note 97 *supra*.

271. See note 113 *supra*.

272. See text following note 149 *supra*.



materials in the file.<sup>273</sup> The consumer should have the right to make an abstract of the disclosed information and, upon payment of a reasonable reproduction charge, to purchase a copy of any reports in his file.

5. Each consumer should be entitled to disclosure at no charge once a year, upon request.<sup>274</sup> Additional disclosures may be charged to the consumer, except where adverse action has been taken within the prior 30 days as a result of information provided by the consumer reporting agency.

6. The consumer reporting agency should be required to maintain strict procedures to keep public record information up-to-date and complete, without regard for the purpose in which it will be used.<sup>275</sup> Where public record information is to be furnished for employment purposes, the consumer reporting agency should be required to make a good faith effort to interview the subject of the report.<sup>276</sup>

7. Where an application normally entails an investigation, or where it is known by a party offering credit, insurance or employment that he will probably request an investigation, the consumer should be so apprised at the time the application is made.<sup>277</sup> At the same time, the applicant should be supplied with a standard form used by consumer reporting bureaus in reports of the kind normally prepared under the circumstances of the consumer's application.<sup>278</sup>

8. Because actual damages are often difficult to prove when credit, insurance, or employment is denied, but great inconvenience and embarrassment might be created for the consumer, the FCRA should be amended to include mandatory damages (plus attorney's fees) to be awarded in lieu of proof of actual damages, where the act is violated.<sup>279</sup>

### C. ROLE OF THE FEDERAL TRADE COMMISSION

The Fair Credit Reporting Act is a model of administrative fragmentation. The law is set up to be enforced by nine different Federal

273. See text preceding and following note 151 *supra*.

274. See text following note 155 *supra*.

275. See text following note 194 *supra*.

276. See text at note 195 *supra*.

277. See text following note 243 *supra*.

278. See text at note 247 *supra*.

279. The need for such a provision may be seen in *Miller v. Credit Bureau, Inc. of Washington, D.C.*, (Superior Court of Dist. of Col., June 1972) reported at 4 CCH CCG, *supra* note 22, ¶ 99.173. A consumer who was denied a credit card on the basis of erroneous information sued the credit bureau for failing to follow reasonable procedures to assure maximum possible accuracy of information. The Court found the credit bureau to have been in negligent non-compliance with the FCRA. However, since the plaintiff couldn't prove damages, no recovery was allowed. Precedents for in lieu damages may be found in the Copyright Act, 17 U.S.C. § 101(b), and in the UNIFORM COMMERCIAL CODE, § 9-507(1). In drawing an in lieu provision, attention should be given to (a) the possibility of nuisance litigation, and (b) the possibility of class actions, and whether there should be a limit on the total amount recoverable.



agencies, no one of which has the authority to promulgate regulations.<sup>280</sup> Fragmentation in itself has little bearing on the government's ability to oversee the personal information market, because the consumer reporting agencies fall within the statutory ambit of a single agency, the Federal Trade Commission. (The other agencies are charged with enforcing the FCRA as it pertains to particular consumer report users who were already under agency supervision.)

A more significant obstacle to effective enforcement is the FTC's lack of rule-making authority.<sup>281</sup> Such authority was deliberately left out of the FCRA because industry representatives, still in a haze over the complexities in Truth-in-Lending Regulation Z<sup>282</sup>--which had been promulgated not long before passage of the FCRA--feared that they would be immersed in red tape of the FTC could write rules.<sup>283</sup> It is also possible to surmise that the consumer reporting industry felt that it could live with a law which it wrote, but didn't want to face the possibility of detailed oversight if the FTC could fill in the gaps with rules having the force of law.

In the absence of regulatory power, the FTC has moved rather slowly in enforcing the FCRA. Definitional kinds of problems have been temporarily resolved by having the FTC staff issue informal opinions about the meaning of the FCRA. These are non-binding and purely advisory. The Commission itself has held hearings on a few definitional matters, including whether motor vehicle departments, lenders exchanges, credit guides, protective bulletins, and pre-screening for direct mail solicitation are covered by the FCRA.<sup>284</sup> These hearings will eventuate in formal interpretations of the act, but the formal interpretations will not be binding on anyone, except to the extent that they are persuasive in court. Lack of binding guidance from a central source has caused some confusion and (according to FTC staff attorneys) substantially affected FTC's ability to administer the law.

Vigorous enforcement of the FCRA will require a number of changes. Most importantly, the FTC should be given rule-making authority. It should be able, for instance, to define in detail what are "reasonable procedures" for consumer reporting agencies to follow.

Going beyond rule-making, several other changes should be considered for the FTC. First, the FTC should be authorized to require all consumer reporting agencies to register. Registration should include basic information about the agency's operations, including a statement

---

280. FCRA, *supra* note 5, § 621(b).

281. FCRA, *supra* note 5, § 621(a).

282. 12 C.F.R. § 226 (1972).

283. ACB, HOW TO COMPLY WITH THE FAIR CREDIT REPORTING ACT 21 (1971).

284. FTC News, June 16, 1972.



of the procedures used for compliance with the FCRA. Unless registered, one could not conduct business as a consumer reporting agency. Anyone could register except where the FTC finds that the applicant could not reasonably be expected to be financially responsible in the conduct of his business, or where the past conduct of the applicant provides reasonable grounds for believing that he would not carry on business in accordance with law and with integrity and honesty.<sup>285</sup>

Registration is needed for three reasons. First, it would allow the FTC and the public to identify the reporting agencies and to understand what each one does. Second, it would provide leads for enforcement, so that a scatter gun approach is no longer necessary. And third, it would provide a minimum control over market entry, to weed out at least some of the more dubious practitioners.

Much has been written about regulation in recent years, with the increasingly common conclusion that government regulation generally doesn't do much good; rather, such closing off of market entry guarantees a monopoly for the members of the regulated industry, to the ultimate detriment of consumers.<sup>286</sup> As Professor Stigler has observed,<sup>287</sup> regulation is generally acquired by an industry and is designed and operated primarily for the industry's benefit.

Indeed, regulation is beginning to find advocates among the ranks of inspection bureau owners.<sup>288</sup> This is particularly true for the local independents who are the first to suffer when new competition enters their market. With market entry costs minimal new inspection bureaus are constantly entering the scene, and, as one would expect, are making their presence known by under-pricing the existing firms.<sup>289</sup> To meet the new competition, existing firms must also cut prices. This is normally done by discount arrangements rather than by changing the published price schedule, with the effect that no firm is certain how low it must go in negotiating for contracts. Cutting prices has but one meaning to the inspector: he must increase an already overwhelming production of reports in order to maintain the same income. Price competition, then, leads to shabby reporting. It would be far better, the argument goes, if competition revolved around quality of reporting rather than pricing.

---

285. In a bill proposed by the Minister of Consumer and Commercial Relations in Ontario, Canada, these powers would be given to a newly created Registrar of Consumer Reporting Agencies. Bill 229, 2d Sess., 29th Legis., Ontario, 21 Eliz. II, 1972.

286. See, e.g., Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1968); Hilton, *The Consistency of the Interstate Commerce Act*, 9 J. OF LAW & ECONOMICS 87 (1966); and Note, *Is Legislation Necessary? California Air Transportation and National Regulatory Power*, 74 YALE L. J. 1416 (1965).

287. Stigler, *Theory of Economic Regulation*, 2 BELL J. OF ECONOMICS & MANAGEMENT SCIENCE 3 (1971).

288. Interview with William Dorf, Illinois Service Bureau, Dec. 18, 1972.

289. *Id.*



One implication of this argument might be that the prices of consumer reports ought to be regulated. This approach should be rejected for three reasons. First, price regulation is always difficult, expensive, and subject to political distortions.<sup>290</sup> Second, price regulation would make it difficult for new firms to break into the market, even if the new firms were capable of more efficient operations than the existing firms. And third, there is no guarantee that increased income for the more efficient regulated firms would be passed down to inspectors in the form of lower production quotas. It may be that price competition leads to anti-social results in the insurance inspection industry, but price regulation does not seem to be the proper antidote.

Registration of the type described earlier would have only a small effect on market entry, by allowing the FTC to screen out firms which can be predicted to be shabby operators. The screening should not be used to block entry to firms about whom there is reason to believe they would operate efficiently and with integrity. It is logical, however, that registration should carry with it certain standards of how a firm must operate, in order to be considered satisfactory. It also follows that a firm which does not meet the required standards should lose its registered status.

The basic standards for maintaining registered status should be set by Congress, with details supplied in rules and regulations promulgated by the FTC. A number of standards worthy of consideration have already been suggested in this section. Additional standards applicable to inspection bureaus include:

1. Individual inspectors must pass an examination showing understanding of the relevant laws and ethical guidelines for inspection.

2. Training programs and apprenticeship period should be mandatory and subject to FTC approval.

3. Inspectors should be equipped with identification cards containing their picture. Interviews under pretext should be prohibited, and every source be informed of the identity of the interviewer, his employer (the inspection bureau, not the client), and the purpose of the interview. The source should be informed that his remarks will be treated as confidential, but that his identity may become known in the case of litigation.

4. Management and supervisory personnel must meet licensing standards based upon examination and prior experience. The

---

290. See Stigler, note 287 *supra*.



supervisory license may be revoked after a hearing by the FTC upon evidence of incompetence in maintaining high standards of conduct by the inspectors for whom the supervisor is responsible.

5. All investigative consumer reports must be reduced to writing and retained on file for at least one year, but for no more than seven years unless it is up-dated. Identification of sources must be retained as long as a report, but must not be a part of the report. The FTC should make random audits at least once a year to assure compliance with this and all other aspects of the law.

6. Protective information quotas and norms should not be used either in connection with evaluating the work of inspectors or in the sale of agency services.

7. Inspection bureaus should be required to develop methods for evaluating the work of inspectors wherein numerical production is not the predominant factor.

8. Consolidation of files which contain investigative consumer reports are not to occur without prior FTC approval. This is intended as a safeguard against the centralization of Retail Credit Co.'s files, and to insure that files will remain in the vicinity of their subjects where they are easily available for FCRA access.

9. The FTC should have the power to adjudicate disputes between consumers and reporting agencies which are not satisfactorily settled under the FCRA procedures.

The type of regulation proposed in the above standards and in the earlier proposals would not result in most of the disadvantages decried by the economists (*See* note 287, *supra*). Although market entry might be made slightly more difficult because of registration standards, competition would not be reduced. By avoiding price regulation, many of the criticisms of regulation can be overlooked. Finally, by leaving regulation in the hands of the FTC rather than by setting up a new governmental agency, the possibility of industry having an overwhelming impact on the regulators decisions is reduced, because consumer reporting agencies represent only one relatively small concern of the Commission.

What would be the impact of regulation on the economics of the inspection bureau industry? It can be foreseen that higher standards of conduct will increase the marginal costs of preparing reports. This increment would probably be passed on to the insurance companies and employers. Whether this would, in turn, be passed on to consumers depends upon the flexibility of demand for reports, a factor about which no information could be ascertained.



It should be pointed out, however, that the demand for reports is not constant, but reflects the so-called underwriting cycle.<sup>291</sup> When, as in 1972, insurance companies are particularly anxious to sell policies, they are less interested in the careful weighing of risks. Consequently they do not buy as many inspection reports, and are more willing to buy cut-rate reports which might reflect a lower quality of reporting. This cyclical effect, which coincided with the passage of the FCRA, must be kept in mind when members of the inspection industry complain that their industry is being killed off.

One other point to keep in mind is that the inspection industry can be expected to benefit in the near future from the expansion of no-fault auto insurance. No-fault, inspectors believe, will make it more necessary for an insurer to know how many people are in an insured's household, how many potential drivers there are, and whether any of the drivers is accident prone, or a candidate for smashing into a tree for the collection of insurance.<sup>292</sup> A final factor which makes prediction of the impact of regulation rather difficult is the possibility of market changes in the wake of the antitrust actions (described earlier) which are pending against Retail Credit Co.

#### D. CONTENT CONTROLS

A proposal which has frequently been made by critics of the personal information market is that we should simply not allow subjective information to be collected. Phrased in this way the proposal presents serious problems. First, it is not always self-evident whether a particular datum is subjective. Enough "subjective" confirmations tend to give information an objective quality. Furthermore, if the purpose of controlling the content of reports is to promote privacy, it must be recognized that certain private kinds of information may be completely objective. For example, instead of reporting that an automobile insurance applicant's teenage son is a "hippie-type," the report could state objectively that the son has hair that comes to his collar.<sup>293</sup> Instead of

---

291. According to Jaffe, *The Underwriting Cycle*, INSURANCE 35 (May 1972), and Snyder, *The Insurance Industry's 5-Year Cycle*, NATIONAL UNDERWRITER 37 (June 16, 1972), the insurance industry operates in phases. During Phase I, rates are adequate, underwriting is good, agents are cooperative, and in general the industry is profitable. The word goes out to increase volume and not to worry too much about risks. During Phase II, underwriting barriers are let down. Auto and homeowners (personal lines) business suddenly becomes good business. The push for the premium dollar is on. Phase III appears about two years later. After the aggressive premium "buying", the results show up in two ways: deleted surplus and adverse loss experience. In Phase IV, agencies are terminated, lines reduced, areas of operation withdrawn, company personnel changed, and classes of risk dropped. The emphasis shifts back to sound underwriting. Phase V is a waiting period, where the industry waits to see if it can move back to phase I profits. During mid-1972, the insurance industry was said to be in Phase II, the "go-get-'em" phase.

292. Interview with William Dorf, Illinois Service Bureau, Dec. 18, 1972.

293. See Richard A. Shaeffer, *Consumers Gripe That Credit Reporting Law Doesn't Always Work*, Wall Street Journal, Dec. 29, 1971, at 1, col. 6.



reporting that a female applicant for automobile insurance has loose morals, the inspector might write, "Your subject is known to be single and residing with a male room-mate without the benefit of marriage."<sup>294</sup> Objective information, therefore, may be as detrimental to privacy as subjective information.

Another way of stating the problem may be to say that only "relevant" information should be reported. But this, too, has limitations. The life style of the auto insurance applicant's son may not appear to have much relevance to the risk presented by the father, but an auto insurer can certainly argue that it is important to know that a young woman's boy friend is a potential driver of her insured vehicle. Indeed, given the desires of an insurance company or an employer to predict as much as possible about a potential insured or a potential employee, everything has a certain amount of relevance. As a representative of the American Insurance Association told Senator Proxmire's committee:

With the existing type of reparations system for automobile coverage, the question of whether or not, in case of an accident of a serious nature, that the insured is one who would be a defendant that could be credible, or conduct himself, or have the kind of habits that would have the proper effect on jury determination, has a lot to do with what the eventual impact will be on damages in the event of a serious accident.<sup>295</sup>

The real question seems to be; What kinds of information are we willing to see collected? And this carries with it an additional question; Under what circumstances are we willing to have certain kinds of information used in decision-making?

At present, these questions are answered in a laissez-faire manner; that is, if the party paying for the information considers it worth purchasing, it is collected. This is a relatively haphazard method of determination, however, because once it is decided to undertake an investigation, the marginal costs of seeking one type of information as opposed to another are almost infinitesimally small.

Of equal importance, there is no substantial evidence that the purchasers of investigative consumer reports can point to which would indicate the economic impact of *not* obtaining particular kinds of information. The representative of the American Insurance Association was asked by Senator Proxmire if he could prove his assertion that the potential risk of an insured includes his possible credibility to a jury.

<sup>294</sup>. Notorized statement provided by the subject of an article titled *VISTA Worker's Car Insurance Soars*, *The Atlanta Constitution*, Dec. 9, 1971.

<sup>295</sup>. *Proxmire Hgs.*, *supra* note 48, at 313.



"No," he responded, "it is a question of judgment."<sup>296</sup> The hidden question in the controversy over content controls turns out to be; Whose judgment should be accepted?

The judgment could be left to a government agency. After the appropriate hearings, such an agency (most likely the FTC) could state officially what kinds of information could be gathered for what purposes. The problem with this approach, though, is that privacy is an individual concern as well as a societal concern; and if the government agency accepts the arguments of relevancy produced by consumer report users, individuals who value their privacy more highly than the government would have nowhere to turn. On the other hand, if the government were to adopt stringent standards it would be saying, in effect, that citizens may not traffic in certain kinds of information. While the courts have given the government leniency in controlling commercial communications,<sup>297</sup> there may be a limit beyond which the First Amendment should be made applicable.<sup>298</sup>

The government's role in limiting content should probably extend no further than to a series of general statements concerning subjects about which there is wide agreement. For example; in supplementing the existing controls on obsolete data in section 605 of the FCRA, a statute might state that a consumer reporting agency shall not include in a consumer report:

a. any information based on evidence that is not corroborated unless the lack of corroboration is noted with and accompanies the information;

b. information regarding any criminal charges against the consumer where the charges have been dismissed, set aside or not proceeded with;

c. information as to race, creed, color, ancestry, ethnic origin, or political affiliation.

Beyond this, the proper goal should be to give the consumer reasonable alternatives so that if he is forewarned that a particular application will involve an investigation which the consumer finds offensive, he might obtain his objectives in other ways without having to give up valued privacy. For example, group life insurance could be expanded as an alternative to individual life insurance. Insurance companies should

---

296. *Id.*

297. See, e.g., *Grove v. Dun & Bradstreet*, 438 F.2d 433 (3d Cir. 1971), *cert. den.* 404 U.S. 898 (1971); and *Dun & Bradstreet v. Kansas Electric Supply Co.*, 448 F.2d 647 (10th Cir. 1971), *cert. den.* 405 U.S. 1026 (1971), both holding that credit information is not protected from libel by the First Amendment.

298. See Christie, *The Right to Privacy and the Freedom to Know: A Comment on Professor Miller's The Assault on Privacy*, 119 U. PA. L. REV. 970 (1971).



be pressured to experiment with other forms of insurance that would require less personal information about potential insureds. Employers should be required to bargain, collectively and individually, on their policies toward employee privacy.<sup>299</sup>

There is no single, quick and easy way to readjust the balance of privacy and commercial need in the personal information market. Many approaches are needed, and all of the participants in the market--reporting agencies, report users, consumers, and government--must be involved in the search for a decent equilibrium. More information about the market, particularly about detectives and other private investigators, mail-list brokers, and others not treated here, may be required before a complete program of reform can be drawn. But this analysis has hopefully presented sufficient information about the entities covered by the Fair Credit Reporting Act to indicate the areas in which this pioneering attempt to protect individual privacy is strong, and where it is weak; and to suggest the specific directions in which we must move if we are to keep alive the age-old dream of a society of free, autonomous, and above all, spontaneous individuals.

---

<sup>299</sup>. Legislation should be considered for the purpose of bringing employer investigative practices into line with the policies encompassed in the FCRA. One possibility would be to redefine section 603(f) of the FCRA (*supra* note 5) so as not to exclude "in-house" investigations.



## APPENDIX ONE

*THE PERSONAL INFORMATION MARKET IN CHICAGO*

- I. Limited Purpose Credit Bureaus
- II. Full-Service Credit Bureaus
- III. Credit Agencies
- IV. Mercantile Agencies
- V. Inspection Bureaus
- VI. Personnel Reporting
- VII. Miscellaneous Participants in the Personal Information Market

- I. *LIMITED PURPOSE CREDIT BUREAUS*

1. *Consolidated Employee Index*

The Consolidated Employee Index is an agency which maintains an index of employees working in large corporations. Only subscribers have access to the index, and they use it for employment verification purposes. Information provided includes: name of employer, type of work, how long employee has been with company. An estimated 60,000 to 70,000 reports are made per year. *Source:* Harvey Van Geem, Manager, telephone interview, Feb. 22, 1972.

2. *Guaranty Credit Corp.*

This is a specialized agency, a credit bureau and a collection agency dealing strictly in the contracting and rental fields. It has files on about 2,000 people, mostly "colored people" who do business out of their own homes, e.g. by borrowing home improvement or building equipment from a rental firm. Most information comes from day-to-day contacts with renters. Some comes from Credit Information Corporation of Chicago. By reporting on independent contractors, this small bureau falls on the unclear border line between consumer and commercial reporting. *Source:* Arthur J. Wetle, owner, telephone interview, Feb. 22, 1972.

3. *Hooper-Holmes Inc. Credit Index Division*

The Chicago office of this national derogatory information index employs five people, none of whom are investigators. The central computer, located in Basking Ridge, N.J., contains 12 million items. An item includes the name of a consumer who has been written off as a bad debt; the dollar amount lost; the date reported by the subscriber; the age of the account at the time reported; the code number for the reporting company; and the reporting company's code number for the account. The operation is fully computerized, but uses a batch system of processing which results in a lapse of 12 to 24 hours in-house instead of instantaneous response. The Hooper-Holmes Index has approximately 150 subscribers nationally, most of whom are oil companies with credit card programs, direct merchandise marketers such as mail order houses, and book and record companies. These clients are national in orientation and use the index for pre-screening of credit applications so as to reduce their volume of full credit reports bought in the non-local reporting market. The subscriber pays 10c/per request, regardless of whether derogatory information is located. Volume discounts are given at plateaux of 100,000 annual inquiries. With the



exception of a very minor amount of public record information which is collected in some metropolitan areas, all of the information in the computer is provided by the subscribers. One to two million requests from subscribers go through the Chicago office each year, with about two-thirds originating in Chicago. *Source:* E. William Carney, Regional Manager, and Wayne Kaminski, Chicago Manager, interview, Jan. 28, 1972.

#### 4. *Chicago Lenders Exchange*

Every metropolitan area has a lenders exchange. The Chicago Lenders Exchange has a secret telephone number and is not listed in its building directory; the Chicago Daily News calls it "Chicago's secret credit bureau." (Nov. 11, 1972 at 17.) The function, however, is not particularly sinister. The Exchange is an organization of small loan companies, representing 48 member companies in the metropolitan area, with 329 offices. All of these offices telephone the Exchange before approving a loan. The information they receive is in the form of code numbers representing loan companies with whom the potential borrower has outstanding debts. According to the Exchange rules, when a company calls in and obtains a code, he must then call the coded loan company to find out whether the account is open or closed. (In theory it should be open, because when a company closes an account it is supposed to notify the Exchange.) The Chicago Lenders Exchange is a "closed exchange," which means that if a record contains three listings for an individual, either as maker or co-maker, no loan can be made unless the proceeds of such loan will be used to pay off one or more of the outstanding loan balances in full. In the fourth quarter of 1971, the 16 employees of the Exchange handled 66,267 clearances. *Source:* R.W. Hahne, President, telephone interview, Jan. 26, 1972.

#### 5. *TRW Credit Data*

TRW Credit Data is a national credit bureau, whose operations are focused in a computer in Anaheim, Calif. The Chicago office handles the 7 northern counties of Illinois, plus Lake Co., Ind., and holds information on an estimated 5 million individuals in that area. Its projected volume for 1973 is from .65 to 1.2 million reports. Subscribers pay 95¢ per report if they feed their own automated files into the TRW computer; \$1.05 if they turn over account information manually. The Chicago office has approximately twenty visual terminals and one printer (for subscribers who want a written record), which tie into the Anaheim computer in about 8 seconds. Some individual subscribers have their own remote terminals which have direct access to Anaheim.

TRW Credit Data is classified as a limited purpose bureau because the great bulk of information carried is objective financial transaction data. Apparently the company is just beginning to include public record information (bankruptcies, bankruptcy discharges, wage earner plans, wage earner plans terminated, judgments, judgment satisfactions, federal and state tax liens released) in at least some of its reports. Chicago office business is classified as 95.8 per cent in-file reports and 4.2 per cent special reporting. The latter includes mortgage reporting, 'developed' reporting, and employment verification. No investigative reports are made. From its beginning as the Credit Data Corporation in 1960, this firm has been the leading advocate of reform in the credit reporting industry. The company's history and activities are detailed in the forthcoming book, *Data Banks in a Free Society*, by Alan F. Westin and Michael A. Baker. *Sources:* Gilbert Hamblet, Vice President, interview, Jan. 12, 1972; letter, Cheri L. Cole, Associate Director of Public Affairs, Dec. 12, 1972.



## II. FULL-SERVICE CREDIT BUREAUS

### 1. *Chicago Credit Bureau, Inc.*

The Chicago Credit Bureau is not only the oldest in the city, but is the only one of the Big Three (CIC and TRW Credit Data are the others) which is not computerized. CCB advertises that it has over 7 million credit records in file, and that it serves more than 2,000 local subscriber firms. It employs about 200 individuals, some of whom work at the subscriber's place of business. All investigations are by telephone. CCB offers a variety of services, including in-file clearances (30¢ to a subscriber if no record is found; 45¢ if there is one), trade reports, short form reports, standard credit reports ("complete detailed information as to residential data, character, employment or business, financial responsibility and trade history residing in Chicago" for \$2.75 to subscribers), employment verification, employee reports, business reports, assets-locate reports, and mortgage reports (\$7.00 to subscribers). CCB also has a collection division, the Credit Service Corporation. Subscription to credit bureau services is \$25 yearly. *Source:* Milton I. Deutsch, President, interview, Jan. 19, 1972.

### 2. *Credit Bureau of Western Cook County*

CBWCC is a full-service credit bureau located in the Chicago suburb of Oak Park. It is a manual operation, employs about 85 persons, and has approximately 2 million individual files. Of the 250,000 reports prepared each year, about 55 per cent are consumer credit reports, 40 per cent mortgage reports, and 5 per cent investigative reports, prepared for employment purposes. Criminal record and arrest information is obtained from police departments. CBWCC has a collection division. *Source:* Mr. Sterling, Manager, interview, Jan. 17, 1972; letter, Nov. 21, 1972.

### 3. *Credit Information Corporation of Chicago (CIC)*

CIC, the largest credit bureau in Chicago, is a subsidiary of the Trans Union Systems Corporation, which is an affiliate of Trans Union Corporation. It is the successor to the old credit bureau of the State Street merchants, but has grown rapidly since the 1968 Trans Union takeover, computerizing and acquiring six other metropolitan area credit bureaus. All information is in the central computer on Michigan Avenue, the branch offices being tied in by remote terminals. CIC has records on 5.8 million individuals in the Chicago area. It sells over 3 million reports a year, 90 per cent of which are consumer credit reports. About 1 per cent of the reports are for employment purposes, with the remainder divided between mortgage reports and tenant reports. All investigating is by telephone or mail. CIC advertises that it serves "over 3,000 Chicagoland businesses." Its 250 employees answer over 10,000 inquiries a day. CIC does not engage in collection work, but like CCB, it is associated with brokerage and sales firms in the non-local market. Like the other full-service credit bureaus, CIC collects and reports public record information. In addition to the in-file report, which sells for \$1.25, CIC's schedule of reporting services and prices includes 13 categories of reports, ranging from skip tracing reports (\$6) to special investigations (\$10 per hour). [The latter would seem to contradict the assertion that all investigations are made by phone or mail.] *Source:* T.E. Sheahen, Vice President, interview, Jan. 25, 1972, and letter, Nov. 17, 1972.

### 4. *Service Credit Bureau*

Service Credit Bureau is a full-service bureau located on the South Side of Chicago. It has manual files on 500,000 individuals, and specializes in



written reports. Consumer credit reports account for 10 per cent of Service Credit's volume; rental reports, for 60 per cent; mortgage reports for 15 per cent; and personnel reports for 5 per cent. The only investigative reports, under the FCRA definition, are those prepared for personnel purposes. *Source:* Joanne Strong, Manager, interview, Feb. 10, 1972.

#### 5. *Other Credit Bureaus*

Other full-service credit bureaus serving the metropolitan area include: Central Credit Bureau of Cook County; Credit Bureau of Arlington Heights; Credit Bureau of the South-West Area; Credit Bureau of Eash Chicago; Credit Bureau of Hinsdale; Credit Bureau of Palatine; Credit Bureau of Skokie Valley, Inc.; Credit Bureau of Southern Cook Co., Inc.; Credit-Q Suburban Bureau; and Southtown Service Bureau, Inc.

### III. *CREDIT AGENCIES*

#### 1. *Blomquist Reporting Service, Inc.*

This is one of several reporting agencies listed in the telephone directory which was unwilling to grant an interview. Mr. Blomquist stated, however, that his firm only does mortgage reporting, and that these are non-investigative reports, routinely containing information on the mortgagor's age, wife, children, residence, employment, assets, references, and litigation. *Source:* Mr. Blomquist, telephone interview, Jan. 30, 1972.

#### 2. *Hale-Prietsch Services, Inc.*

Founded in 1933, Hale-Prietsch is one of the larger independent reporting agencies in the country. Its primary, though not exclusive, area of service is Chicagoland. The clients of Hale-Prietsch tend to be banks and savings & loan institutions; these are frequently faced with commercial decisions involving large amounts of money, where the standard credit report would provide sufficient information. Hale-Prietsch has 8 to 12 million records on more than 2 million individuals. About half of the business relates to commercial reports. Of the 100,000 reports per year covered by the FCRA, in-file clearances (\$1.25) account for 70 per cent. Narrative written reports (\$15 minimum) account for 30 per cent. No reports are made for insurance purposes; 5 to 10 per cent are personnel reports. All investigating is by telephone or mail. Of the 55 to 65 employees, 30 are "reporters" who gather information and write reports. Two men are in the courts daily to check public records. Several people monitor the telephones for in-file clearances. The operation is not computerized. Except for telephone clearances, the average report takes days or weeks to prepare. *Source:* Mr. and Mrs. Prietsch, interview, Jan. 18, 1972, supplemented by their testimony before the Proxmire and Sullivan committees (*see* footnotes to the text, Nos 38 and 49, *supra*).

#### 3. *Retailers Commercial Agency (RCA)*

A wholly owned subsidiary of Retail Credit Company, with offices adjoining the parent, RCA is one of the older credit bureaus in Chicago. Although it does some work for local clients (*e.g.*, checking out tenants for the John Hancock building), it mainly handles national accounts such as the credit card oil companies. The RCA report is different from other credit reports in that it is narrative in form and goes into more depth. Most of the investigating is done by telephone, although if more is needed, street work will be subcontracted to Retail Credit Co., (whose office is adjoining). The Chicago office of RCA has about 200,000 individuals on file and prepares about 32,000 consumer reports per year, according to a spokesman for Retail Credit Co. There are 14 employees in this office. *Sources:* Tom Linnen, Manager-Operations, Chicago Retail



Credit Office, Jan. 20, 1972; letter from Henry A. McQuade, Assistant Director Public Relations, Retail Credit Co., Feb. 23, 1972.

#### IV. MERCANTILE AGENCIES

##### 1. *Dun & Bradstreet*

The Chicago office of D & B, which covers DuPage, Cook, and Will Counties in Illinois and Lake County in Indiana, has files on approximately 87,000 of the more than 200,000 businesses in the area. Because D & B might send out 10 to 100 or more reports concerning a given company during a year, the 87,000 figure is the most meaningful indicator of size. Subscribers to D & B services are primarily manufacturers, wholesalers, banks and insurance companies who have need for reports on other businesses to serve as a basis for credit, insurance or other business decisions. Less than 1/2 of 1 per cent of D & B's reports are consumer reports within the FCRA definition. Typically these are reports requested by lending institutions which are considering granting a mortgage loan. "Such reports, while they contain identifying information concerning the consumer, verification of employment if possible and, if requested, permissible record items, are less broad in scope than consumer reports which might be prepared by other companies, for purposes such as determining qualifications for insurance. In other words, we do not seek or publish information concerning a subject's personal habits, consumption of alcohol, etc." D & B Individual Report Form 98, however, does include a question about character and general reputation.

Commercial reports also contain a limited amount of personal information, usually concerning the proprietor, partners or officers of the business reported on. The primary source of information is the subject himself. "Our employees always identify themselves and never act under subterfuge. Every Company (or individual) on which we report may read and discuss his report with us at any time desired." *Source:* Charles F.G. Raikes, General Counsel of D & B, letter, Mar. 14, 1972, and interview, Mar. 22, 1972.

##### 2. *Other Mercantile Agencies*

Among the other mercantile agencies listed in the Chicago Yellow Pages are: Builders Commercial Agency; Dairy Credit Bureau; Dealers Control Credit Bureau; Electrical Manufacturers Credit Bureau, Inc.; Florists Credit Association, Inc.; Food Industries Credit Bureau; Food Service Equipment Manufacturers Credit Bureau; Graphic Arts Credit Bureau; The Jewelers Board of Trade; Lumbermen's Credit Association, Inc.; Manufacturers Clearing House of Illinois Inc.; Printing Trades Credit Association; Professional Merchants Credit Bureau; and the Sporting Goods Industries Clearing House.

#### V. INSPECTION BUREAUS

##### 1. *American Service Bureau*

Founded in 1920 by the American Life Convention in order to provide competitively priced inspection to the life insurance industry, ASB is a leading inspection bureau in the life and health insurance area. Life and health account for 93 per cent of ASB's reporting; auto insurance constitutes 6 per cent; and personnel reporting, 1 per cent. The Standard rate for an ASB life insurance inspection in Chicago is \$5. Special reports for insurance, personnel, or claims investigations are charged at double or triple the standard rate, or on any hourly rate of \$10.50. ASB employs approximately 40 full-time inspectors and 11 part-time inspectors in the Chicago area. They report on approximately 112,000 individuals annually. *Source:* Frank D. Wood, President, interview Jan. 27, 1972; letter from Claude Tinsley, Jr., Exec. V.P., Dec. 8, 1972.



## 2. *The Equitable Life Assurance Society of the United States*

Equitable has had an "in-house" inspection operation for over 100 years; at present, however, it is the only insurance company which does not turn to independent inspectors for reporting. For its Chicago area reports, Equitable employs 6 full-time and 5 part-time inspectors. They reported on approximately 12,000 individuals in the Chicago area in 1972. Eight-five percent of these reports were for life and health insurance. Other reporting included personnel (5 per cent), mortgages, claims, group cases, and annuitants. *Source:* Paul H. Patterson, Regional Inspection Manager, telephone interview, Feb. 15, 1972, and letter, Nov. 14, 1972.

## 3. *General Adjustment Bureau, Inc.*

GAB was formed about 60 years ago by the stock casualty companies. It has about 700 offices nationally. Prior to 1965 GAB served the industry in handling all types of losses and claims under every class of property and liability insurance policy. Since 1965, GAB has been moving gradually into the inspection field. It now has 15 to 20 inspectors working in the Chicago area, primarily or completely in the property field. *Sources:* Telephone interview with GAB employee who wishes to remain anonymous; Retail Credit Co. Competitor Index.

## 4. *Hooper-Holmes Bureau*

Hooper-Holmes is Retail Credit Co.'s main competitor nationally, and its operations are modeled after Retail's. In Chicago, Hooper-Holmes has 13 inspectors who prepare between 48,000 and 54,000 reports a year. Of these, approximately 60 per cent fall under the FCRA. About 39 percent of Hooper-Holmes volume is life insurance reporting; 2 per cent is employment reporting. *Source:* Loy R. Ivester, Manager, telephone interview, Feb. 11, 1972.

## 5. *Illinois Service Bureau*

ISB is the largest of the local independents, having statewide inspection operations. ISB's full-time Chicago inspectors report on 35,000 individuals a year. (Statewide, 85 inspectors prepare about 60,000 reports annually.) Reporting breaks down as 60 per cent commercial, 30 per cent fire and casualty insurance, 5 percent life and health, and 5 per cent claims. ISB has files on over one million individuals, but these are mainly order tickets and news clippings. Only 100,000 old reports are maintained. The standard rate for an ISB inspection in Chicago is \$5.25. For automobile inspections, a motor vehicle report (MVR) is obtained from the state (at a cost of \$2 to the state plus 25¢ to the Springfield Service Bureau, which expedites matters) and sold to the insurance company for \$2.35. ISB types out an interpretation of the code for each MVR. *Source:* William Dorf, President, interviews, Mar. 24, 1972, and Dec. 18, 1972.

## 6. *Insurance Inspections, Ltd.*

This is a relatively small inspection bureau on the South Side, run by a young man who had earlier experience with two of the nationals. Seven inspectors are employed to prepare over 7,000 reports a year. A majority of the reports are automobile insurance inspections; the remainder are property inspections. *Source:* Michael Davenport, President, interview, Feb. 3, 1972.

## 7. *O'Hanlon Reports (National Inspection Bureau, Inc.)*

O'Hanlon Reports was founded in 1934 by a former officer of Hooper-Holmes. Inspection methods are similar to Retail Credit's, but most of O'Hanlon's reporting is in the fire and casualty and claims field. Unlike most inspection bureaus, O'Hanlon's uses a color code system on its reports which indicate



at a glance the result of the report. O'Hanlon's refused to grant an interview, but it is believed that Chicago operations are on a very small scale. *Source:* Retail Credit Co. Competitor Index and confidential industry sources in Chicago.

#### 8. Retail Credit Co.

As the national leader in the provision of business information, Retail Credit's operations are discussed at length in the text and footnotes. The Chicago office employs about 75 persons, about three-fourths of whom are inspectors ("field representatives"). The office prepares approximately 75,000 consumer reports annually, which break down as: life and health insurance, 45 per cent, automobile insurance, 19 per cent, property lines, 9 per cent, employment, 7 per cent, claims, 5 per cent, and miscellaneous, 2 per cent. About 400,000 individuals are subjects of files kept in the Chicago office. *Source:* Tom Linnen, Manager-Operations, Chicago office, interview, Jan. 20, 1972; letter from Henry A. McQuade, Public Relations, Feb. 23, 1972.

#### 9. Service Review

Service Review is a subsidiary of Allstate Enterprises, Inc., and has been making reports for Allstate Insurance since 1929. In the last two years it has also been making reports for other insurance companies, in competition with Retail Credit and the other bureaus. Service Review has 27 inspectors covering the Chicago area. While Chicago statistics are not available, Service Review prepares 75,000 to 90,000 reports per year statewide. Of these reports, 70 per cent are for automobile insurance; 20 per cent for property; and 10 percent for life insurance, personal reports, and claims. *Sources:* Mr. Colliver, Service Review employee, telephone interview, Feb. 1, 1972; letter from S.R. Burg, Operating Manager, March 27, 1972.

#### 10. Underwriters Reports, Inc.

U.R.I. is a local independent which has an office in St. Louis as well as the Chicago office. In Chicago, it employs 6 full-time and 8 part-time inspectors, and annually prepares between 75,000 and 100,000 reports. Of these, 65 per cent are for commercial lines of insurance; 20 per cent for automobile insurance; 10 per cent for homeowners insurance; and 5 per cent miscellaneous. U.R.I. has files on approximately 200,000 Chicago area residents. *Source:* H. Gianvecchio, General Manager, interview, Feb. 16, 1972; letter, Nov. 17, 1972.

#### 11. Others

Other inspection bureaus thought to be operating in Chicago include Best's Reports (organized in 1960 by a former O'Hanlon employee); Factual Service Bureau (formed in 1953 by former Retail Credit Co. claim inspectors, specializing in more involved types of investigations); Jasper's reports (formed by a former Hooper-Holmes manager in 1949, working in the fire and casualty field); and Thomas Reports (mainly fire and casualty lines). It is believed that several other small inspection bureaus are operating in Chicago, often with only one or two inspectors. *Sources:* Retail Credit Co. Competitor Index; confidential industry sources in Chicago.

### VI. PERSONNEL REPORTING

#### 1. Burns Detective Agency

Like the other big detective agencies, Burns handles personnel reports as a sideline. Most of this work involves highly paid executives either being consi-



dered for a job or suspected of malfeasance while on the job. *Source:* Mr. Springborn, Investigations Division, telephone interview, Feb. 15, 1972.

### 2. *Fidelifacts*

This nationwide firm, originally formed by former FBI men, had franchises in 27 cities in 1969. It specializes in personnel investigations. No interview could be obtained. *Source:* Retail Credit Co. Competitor Index.

### 3. *Heidrick and Struggles*

Heidrick and Struggles is a national executive search and management consulting firm with home offices in Chicago. It is retained by organizations searching for peculiarly well-qualified high level officials. Most of the research is carried out by the Heidrick and Struggles staff, though supplementary information is occasionally obtained from Retail Credit Co. and other investigative firms. *Source:* Gardner Heidrick, interview, May 2, 1972; Wall Street Journal, September 28, 1971.

### 4. *John T. Lynch Co.*

Prior to the FCRA, this detective agency had a fairly steady flow of requests for background pre-employment investigations on executives. These would take in the vicinity of 50 hours, charged at \$12.50 an hour. This business has fallen off drastically since passage of the FCRA. *Source:* unidentified head of investigation, telephone interview, Feb. 22, 1972.

### 5. *Wackenhut Corporation*

Wackenhut's Investigations Division specializes in the field of security personnel investigative work for defense connected industry. According to the Retail Credit Co. Competitor Index, "The company's plan is to set itself up as a clearing house to aid private business in its hiring of personnel -- pre-employment clearing house. It also plans intensive involvement in counter business espionage... They currently have files on over 3,000,000 people." As to inspection methods, the RCC Competitor Index says, "Essentially the same as ours with less rigid requirements as to how the information is obtained. Use a great deal of policemen on their off duty hours or vacations and retired military personnel with investigative backgrounds. However, in the Investigative Division they use far more equipment than we do."

According to the head of investigations in Chicago, Wackenhut does very few pre-employment reports, except on the executive level. *Source:* Mr. Gavin, telephone interview, Feb. 15, 1972.

## VII. MISCELLANEOUS PARTICIPANTS IN THE PERSONAL INFORMATION MARKET

### 1. *Bureau of Motor Vehicle Services*

In 1971, the State of Illinois transmitted 1,585,543 motor vehicle reports (MVR's). Of this total, 1,392,174 were sent to private citizens, insurance companies, credit bureaus, etc. The remainder, 193,369, were sent to law-enforcement officials. Disclosure of these records is mandatory under state law upon written request accompanied by the statutory fee of \$2. *Source:* Thomas R. Billington, Legal Advisor, Mar. 22, 1972.

### 2. *The Chicago Law Bulletin*

As a sideline to its normal function as a daily law bulletin, this company sells public record information to local consumer reporting agencies. As an indication of the volume of this sideline, the Chicago Credit Bureau purchased the following items, each on a small card, in the month of December, 1971: 6,031 judgments; 956 satisfactions; 855 federal tax liens; 281 federal tax lien



releases; 714 Lake County judgments; 405 Will County judgments. *Source:* Milton Deutsch, Chicago Credit Bureau, interview, Jan. 19, 1972.

## APPENDIX TWO

### *ADVERSE ACTION NOTIFICATIONS*

#### I. Sample Form Letter Used By A Chicago Women's Clothing Chain

Dear

Your application for a charge account has had our careful consideration and we truly wish we could give you a favorable decision.

The information submitted, however, does not meet our requirements and we, therefore, cannot grant your request. Our decision is based on the information given on the application and supplemented by a routine credit report received from the credit bureau named below.

It is always most difficult to give such a decision to a customer and we are sorry we cannot serve you in this instance.

Very truly yours,

ABC COMPANY  
Credit Department

Name of Credit Bureau  
Address  
(information stamped in)

#### II. Sample Form Letter Used By A National Insurance Company Headquartered in Chicago

Dear

Re: Policy #

As a regular part of our business we develop certain facts necessary for proper rating and thorough underwriting. Sometimes we seek to verify this information by ordering a report from an unbiased third party.

We did order such a report in your case and wholly or partly on the basis of information contained in that report we:

- are unable to write your insurance
- are unable to renew your coverage
- find it necessary to cancel your policy
- have increased your premium
- have restricted your coverage

This information was provided in a consumer report made by



a reputable source of information.

If you have not already heard from your agent on this, you will shortly.

If you want to know more about the actual content on that report, please contact the company named above.

Yours very truly,

Manager, Underwriting Division

### APPENDIX THREE

#### *DISCLOSURES, SELECTED CONSUMER REPORTING AGENCIES, CHICAGO*

##### I. *Credit Bureaus*

Agency	Disclosures per Month to Consumers		Date of Information	
	Pre-FCRA	Post-FCRA		
Chicago Credit Bureau	40 - 60	200 - 500	Jan. 19, 1972	
Credit Information Corporation of Chicago	200 - 300	4,000	Nov. 17, 1972	
TRW Credit Data	100	600	Dec. 12, 1972	
Western Cook County	80	140 - 160	Nov. 21, 1972	

##### II. *Inspection Bureaus*

Agency	Disclosures per Month to Consumers		Date of Information	
	Pre-FCRA	Post-FCRA		
American Service Bureau	0*	10 - 15	Dec. 8, 1972	
Hooper-Holmes Bureau	0	2	Feb. 11, 1972	
Illinois Service Bureau	0	1	Nov. 14, 1972	
Retail Credit Co.	0*	80 - 120	Jan. 20, 1972	

\* Sometimes the consumer would learn the content of his file from the manager of the inspection bureau or from his insurance agent; but this was rare.

Source: Figures were provided by executives of the agencies concerned.



## APPENDIX FOUR

*IDENTIFICATION FORMS AND WAIVERS*

- I. Sample Identification Form Used for FCRA Disclosure\*
- II. Sample Waiver Form Used for FCRA Disclosure

\* This identification form is not necessarily typical for the industry. The President of ASB acknowledged that it asks for too much information, and stated that it would be changed when the supply runs out. Interview, Frank D. Wood, Jan. 27, 1972. As of Dec. 8, 1972, it is still in use. Letter from Claude H. Tinsley, Jr., Exec. V.P., Dec. 8, 1972.



## I. Sample Identification Form Used for FCRA Disclosure

## AGREEMENT

(To be signed and returned to the American Service Bureau)

I understand that the American Service Bureau and/or agent will disclose to me by telephone, the contents of their file concerning me as provided by Public Law 91-508, (the Fair Credit Reporting Act) following proper identification and payment of any toll charges.

I further understand that the Act grants me the right to question any statement in my file, as to its accuracy or completeness.

Regarding charges for service, I understand that:

- A. There will be no charge for disclosure of file information to me if my request for disclosure is being made within 60 days following my receipt of a notice of rating or decline for insurance, or rejection for employment. I am to provide the notice, or copy thereof, as proof of receipt.
- B. If more than 60 days have elapsed from the time I received notice, and the time of my request for disclosure, the law provides a reasonable charge to be made. (The charge will be \$5.00)
- C. If request is being made for personal reasons (no notice received) the law provides a reasonable charge to be made. (The charge to be \$5.00)

(Where the \$5.00 payment is required, your check or money order should accompany the Agreement.)

I understand that the American Service Bureau, Inc. shall within a reasonable period of time reinvestigate and record the current status of any information in question, unless it has reasonable grounds to believe that the dispute is frivolous or irrelevant.

When reinvestigation fails to confirm or re-verify previously reported information, the American Service Bureau shall promptly delete such information from its files. I also understand that if the reinvestigation does not resolve the dispute, I may file a brief statement setting forth the nature of the dispute and the American Service Bureau, Inc. shall on any subsequent report containing the information in question, clearly note that it is disputed and provide my statement or accurate summary thereof. I further understand that, following any deletion of information or notations as to disputed information, the American Service Bureau, Inc. shall, at my request, properly advise the current status to any persons who received a report (in the past two years for employment purposes, or within the past 6 months for insurance) which contained the deleted or disputed information.

To assist me and the American Service Bureau, Inc. to resolve any items in question or in dispute in accordance with Public Law 91-508 (Fair Credit Reporting Act) I authorize the American Service Bureau Inc. to conduct an investigation at its own expense and hereby authorize any business, any organization, any professional man, or anyone else, to disclose full information about me and to give to the American Service Bureau, Inc. copies of any records about me.

Name \_\_\_\_\_

Date \_\_\_\_\_ Address \_\_\_\_\_

Form 133 (4-71)

## II. Sample Waiver Form Used for FCRA Disclosure

AMERICAN SERVICE BUREAU  
IDENTIFICATION AND FILE COMPARISON

This form when completed will provide proper identification as required by Public Law 91-508, (Fair Credit Reporting Act). It will also assist in our desire to keep your costs (Telephone Toll Charge) to a minimum when disclosure is made. Thank You.

My name is \_\_\_\_\_ Date of Birth \_\_\_\_\_  
 Drivers License Number \_\_\_\_\_ State \_\_\_\_\_ Social Security Number \_\_\_\_\_  
 I am married \_\_\_\_\_ Single \_\_\_\_\_ Divorced \_\_\_\_\_ I have \_\_\_\_\_ dependents  
 My residence address is \_\_\_\_\_ Res. Phone: \_\_\_\_\_ Bus: \_\_\_\_\_  
 My former residence address is \_\_\_\_\_  
 My occupation is \_\_\_\_\_  
 Name of my employer is \_\_\_\_\_ I have been so employed \_\_\_\_\_ years  
 My business address is \_\_\_\_\_  
 Nature of my business is \_\_\_\_\_  
 My occupation for the past five years has been \_\_\_\_\_  
 \_\_\_\_\_  
 My appr. worth is \_\_\_\_\_ My appr. income is \_\_\_\_\_  
 I own the following real estate \_\_\_\_\_  
 I have the following banking connections \_\_\_\_\_ Checking \$ \_\_\_\_\_  
 \_\_\_\_\_ Savings \$ \_\_\_\_\_  
 Court records, if any, (Including Driving) in my name are as follows \_\_\_\_\_  
 \_\_\_\_\_

## REFERENCES:

1. (Name) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_
2. (Name) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_
3. (Name) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_
4. (Name) \_\_\_\_\_ (Address) \_\_\_\_\_ (Phone) \_\_\_\_\_

Signed \_\_\_\_\_

Form 134 (4-71)



APPENDIX FIVE  
*SERVICE AGREEMENT FOR FCRA COMPLIANCE*

HALE-PRIETSCHE SERVICES, INC.  
COMMERCIAL REPORTS  
TELEPHONE 922-1900  
209 W. JACKSON BLVD. • CHICAGO 60606  
TWX NO. 910-221-0281

BANKERS CLEARANCE BUREAU  
A DIVISION

SERVICE AGREEMENT

In compliance with Section 607 of Title VI (Fair Credit Reporting Act) under Public Law 91-508, known as the Consumer Credit Protection Act, we must ask our clients to sign this agreement and certification.

In order to cooperate with other business and professional people in the dissemination of confidential credit, employment, and other information, the undersigned agrees to the following when using the reporting service of Hale-Prietsch Services, Incorporated, for consumer credit and employment purposes.

THE UNDERSIGNED CLIENT AGREES:

That he will comply with all the provisions of Title VI (Fair Credit Reporting Act) of Public Law 91-508.

The client certifies that consumer inquiries will be made, and/or consumer reports ordered only for a permissible purpose as defined in Section 604 of the Act, namely

- (A) Intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or
- (B) intends to use the information for employment purposes; or
- (C) intends to use the information in connection with the underwriting of insurance involving the consumer; or
- (D) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

The client further certifies that the information will be used for no other purpose than the one given when ordering the consumer report, and

That the employees of the client are forbidden to attempt to obtain reports on themselves or associates, or on any other person except in the exercise of their official duties.

Client's code # \_\_\_\_\_  
Name \_\_\_\_\_  
By \_\_\_\_\_  
\_\_\_\_\_  
Title of officer

Date \_\_\_\_\_




## APPENDIX SIX

## IMPACT OF FCRA ON GOVERNMENT

- I. Correspondence from City of Chicago Department of Police
- II. Correspondence from Federal Housing Administration
- III. Correspondence from Veterans Administration
- IV. Correspondence from U.S. Postal Service
- V. Correspondence from Department of Justice

CITY OF CHICAGO / DEPARTMENT OF POLICE    1121 South State Street    Chicago, Illinois 60605    744-4000



RICHARD J. DALEY, Mayor  
JAMES B. CONLISK, JR., Superintendent

26 January 1972

Mr. Albert A. Foer  
Associate Editor  
The University of Chicago  
Law Review  
1111 East 60th Street  
Chicago, Illinois 60637

Dear Mr. Foer:

The Superintendent of Police, James B. Conlisk, Jr., has referred to the undersigned your recent communication for acknowledgment and response.

Your letter contained reference to the Federal Fair Credit Reporting Act of 1971 and its impact on investigative procedures of the Chicago Police Department, as well as some related inquiries.

Questions posed and responses to the same follow:

1. Q - Extent of use of Consumer Reporting Agencies prior to approval of FCRA?


A - Unable to determine frequency of such use but reliance on such agencies declined considerably after service fees were imposed.

2. Q - Purposes for which they were utilized?

A - To determine criminal motive, such as collection of fraudulent insurance claims; association of persons and/or organizations which could be construed as "front" corporation or partnership for possible illicit purposes; location of victims, offenders and witnesses, and locate missing persons, to identify some purposes.

3. Q - Importance of such agencies as investigation aids?

A - Significant only as additional sources of information. The information gleaned has been assessed as "minimal but helpful" in developing investigations.

 152L

- I. Correspondence from City of Chicago Department of Police





DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
FEDERAL HOUSING ADMINISTRATION  
WASHINGTON, D. C. 20412

January 14, 1972

IN REPLY REFER TO:  
FAMO

Mr. Albert A. Foer  
Associate Editor  
The University of Chicago Law Review  
1111 East 60th Street  
Chicago, Illinois 60637

Dear Mr. Foer:

This will supplement my letter of December 29, 1971 concerning your request for information regarding credit reports obtained for FHA use.

You are correct in your understanding that FHA makes extensive use of consumer credit reports. Credit reports are the basis for evaluating the acceptability of the mortgage credit risk on applications for mortgage insurance. The FHA contracts for credit reporting services on the basis of competitive bids. Under the terms of the contract FHA mortgagees may elect to purchase reports from the contract sources at the contract price. Although FHA does not refuse to accept credit reports submitted with a mortgage insurance application from any credit information source of a mortgagee's choosing, FHA reserves the right to supplement or verify the credit information submitted by the mortgagees. The number of reports obtained by FHA during a given month varies extensively with the necessity of supplementing or verifying credit information obtained with the applications submitted. During the calendar year of 1971 approximately 600,000 cases were insured. Each of these cases was covered by a consumer credit report which was obtained by the mortgagee or the FHA. Rejected cases are not reflected in this figure even though credit reports would have been attached to the submissions.

The credit reporting coverage criterion required under the FHA Factual Data (Credit) Reports contract falls within the guidelines of the CONSUMER REPORT type set out in the Fair Credit Reporting Act (Public Law 91-508), wherein the information comes from repositories of accumulated credit records and public records as to suits, judgments, foreclosures, garnishments, bankruptcies and other legal actions involving a subject. We do not require or order the type of INVESTIGATIVE CONSUMER REPORTS set out in the Fair Credit Reporting Act dealing with a consumer's character, general reputation, personal characteristics or mode of living obtained through personal interviews with neighbors, friends or associates.

Credit reports are obtained from a varying number of firms each year. Credit reporting agencies bid competitively for award of the annual contract(s) in their respective geographical areas of interest. Twenty-six contracts were awarded for the Fiscal Year 1972. Several of these twenty-six provide

- 2 -

4. Q - Extent of use since approval of FCRA?

A - Utilization declined to the zero level.

5. Q - Has FCRA hampered development of pertinent and necessary information?

A - No. Department resourcefulness has developed productive collateral sources which have been and still are utilized.

Very truly yours,

*Charles Finston*

Charles Finston  
Aide and Legal Coordinator  
to the Superintendent

II. Correspondence from Federal Housing Administration



3.

Paragraph 604 of Title VI of the Fair Credit Reporting Act lists the purposes for which credit reports may be ordered. This has caused us to forego ordering credit reports in one phase of our operations. Sometimes an applicant for an insured mortgage has recently sold a property on which there is an outstanding FHA insured mortgage and the buyer has assumed the mortgage payments. Often in such cases, we will review the credit of the substitute mortgagor before we will guarantee another loan to the seller. To assist in the review, we require the submission of a credit report on the substitute mortgagor. Some credit bureaus have refused to provide these credit reports because the substitute mortgagor is not a party to the purchase transaction or mortgage application that is under consideration. The credit bureaus hold that this is not one of the purposes for which credit reports may be provided. We have not contested their interpretation of Paragraph 604 of the Law.

We trust that the foregoing information will be of some assistance to you in your study.

Sincerely,

*R. David Lasure*  
R. David Lasure  
Director  
Management and Operations  
Assistance Division

2.

credit information in more than one geographical metropolitan area, and only one gives quasi total coverage of the entire United States.

We do not require nor use investigative reports. The Consumer credit report as previously stated is used to assist us in determining whether an applicant has a satisfactory credit standing. It would not be possible to determine what percentage of reports result in a rejection of the applications.

Each insurance program contains specific and varying requirements for qualification for mortgage insurance. Any one or combination of reasons therefore may be the reason for rejection, including of course, an unsatisfactory credit standing.

To comply with that section of Public Law 91-508 which requires the user of a credit report to notify the consumer whenever the consumer has been denied credit or insurance because of information in the credit report, the FHA advises the mortgagee who had submitted the mortgage application of the rejection, and in these instances the mortgagee forwards the extra copy of the FHA "Report on Application" to the mortgagor. On this copy of the "Report on Application" is the name and address of the credit reporting agency as well as a notification of the rejection due to credit characteristics. There is no definite form letter used by the mortgagee in notifying the mortgagor. The mortgagees prepare their own letters based on instructions from this office to include the required information under the Public Law.

The requirement limiting responses to inquiries about individuals has not resulted in any changes in our procedures. On an individual case basis, mortgage credit personnel sometimes request verification of information contained in an application by phone or letter. However, the mortgagor in his application gives us permission to verify any information contained therein. Thus, we do not believe this is a violation of the Fair Credit Reporting Act.

Creditors in the past have always rated the accounts with their customers. That is, they would advise that "payments are as agreed," or "30 to 60 days slow," or "unsatisfactory," etc. These ratings along with information on the accounts would appear in the credit report. Since the Fair Credit Reporting Act has become law, we have been advised by some field offices that some creditors will not rate the accounts any more. They will only provide information on the amount of credit extended, terms of payment, and balance owing. This has not become a serious problem for us, but whenever it occurs, evaluation of the borrower's credit is made more difficult.



Mr. Albert A. Foer

In each case where a loan is denied because of the information contained in the credit report the applicant is furnished with a copy of a letter which informs him that the reason for denial of his loan was based on information contained in a credit report prepared by a specific credit reporting agency. Copies of the form letters that are used by our field stations are attached.

Investigative consumer reports are obtained on fee appraisers, compliance inspectors, and property management brokers. We have no statistics as to number of reports obtained or cost. These reports are obtained under the contract discussed above. When an individual is designated a credit report is ordered. The notice advises that designation was made pending receipt of a satisfactory credit report.

In the accounts receivable activity there are two types of reports secured from Retail Credit Company for persons who are indebted to the Veterans Administration: (a) asset and income reports for debts of \$200 or more, and (b) skip-locate reports for those persons whom we are unable to locate and when the debt exceeds \$300. The price of credit reports ranges from \$4.90 to \$5.25; skip-locate reports range from \$10.00 to \$10.75 per hour with a limit of \$35 each. While we have no statistics as to number of reports ordered, the cost for FY 1971 was \$204,000. It is estimated that \$57,000 was used for skip-locate reports and \$147,000 was used for asset and income reports. These reports are used in making a determination as to the debtor's ability to pay. Prenotification to the consumer is not required as benefits are not denied because of information contained in the report.

In addition to the foregoing, several elements of our Department of Medicine and Surgery utilize credit reports on an as-needed basis. Included are the Veterans Canteen Service, the Supply Service, and the Board on Collections and Compromises. The reports are ordered by individual field stations, and this office maintains no statistics with respect to them that would enable us to answer your questions.

The Veterans Administration has not made any major changes in its procedures as a result of the requirement limiting responses to inquiries about individuals since we do not order investigative type reports incident to loan applications.

When the Fair Credit Reporting Act was first implemented there were some doubts in the minds of lending institutions, especially banks, as to whether by submitting a credit report to the Veterans Administration they would be considered credit reporting agencies. This matter has been the subject of interpretation by the Federal Agencies charged with the supervision of the various types of lending institutions.

2.



VETERANS ADMINISTRATION  
Office of General Counsel  
WASHINGTON, D.C. 20420

FEB 17 1972

IN REPLY  
REFER TO: 024

Mr. Albert A. Foer  
Associate Editor  
The University of Chicago Law  
Review  
1111 East 60th Street  
Chicago, Illinois 60637

Dear Mr. Foer:

This is in response to your letter of November 30, 1971, requesting information from the Veterans Administration pursuant to your study of the effects of the Fair Credit Reporting Act.

The Veterans Administration requires that a Credit Report be submitted with each GI loan application submitted by a private lender for a guaranty commitment. During Calendar Year 1971 we guaranteed some 275,000 home loans of an amount of approximately \$6 billion. Credit Reports are also obtained by the Veterans Administration in connection with the processing of direct loans, release of liability applications and offers to purchase Veterans Administration owned properties which are for sale. These are consumer type credit reports. Investigative type reports are not submitted with loan applications nor are they ordered directly by the Veterans Administration.

For several years the Veterans Administration has had an agreement with the Department of Housing and Urban Development whereby HUD, as the contracting agency, lets invitations to bid and enters into contracts with qualified bidders to supply consumer type credit reports and both agencies, as well as lenders, may obtain consumer type credit reports for loan purposes from these contractors. For Fiscal Year 1972, HUD awarded 26 credit reporting contracts under which the Veterans Administration and private lenders who intend to submit GI loan applications may order consumer credit reports. The price of these reports ranges from \$5.50 to \$7.50 for the basic report plus \$4.00 for antecedents or foreign reports. We have no statistics as to the number of credit reports submitted to the Veterans Administration or ordered by the Veterans Administration or lenders from successful bidders.

Consumer reports that are supportive data to loan applications are used to determine whether the veteran is a satisfactory credit risk as required by the governing law. No figures are available as to the number of adverse actions or rejections of GI loans solely as a result of the information contained in these reports.

Show veteran's full name, VA file number, and social security number on all correspondence.





LAW DEPARTMENT  
Washington, DC 20260

December 30, 1971

Mr. Albert A. Foer  
Associate Editor  
The University of Chicago  
Law Review  
1111 East 60th Street  
Chicago, Illinois 60637

Dear Mr. Foer:

This is in reply to your letter of December 3, 1971, asking for our evaluation of the effect of the Fair Credit Reporting Act (P.L. 91-508) on the postal system. We have received the following information from the Postal Inspection Service:

Unquestionably, the restraints placed on credit reporting agencies have had a deleterious effect on the investigative efforts of the Postal Inspection Service. This is particularly true in the area of mail fraud where incipient violations were previously brought to attention by casualty indexes and reporting agencies such as Hooper Holmes and Company. Since enactment of the new law, such credit reporting agencies no longer provide this Service with reports, and violators in such instances are able to operate for longer periods of time without being detected.

Inspectors obtained consumer credit reports as an investigative aid in many classes of cases. Such reports provided much helpful information and leads quite aside from pure financial data, i.e., leads to acquisition of known handwriting exemplars, physical description of suspects and fugitives, etc. On March 25, 1971, approximately one month before the effective date of the Act, its

IV. Correspondence from U.S. Postal Service

Mr. Albert A. Foer

We have noticed an increase in the number of creditors who decline to furnish credit bureaus with information, or decline to give a rating. We have no statistics on this and our views are based on reviews of individual cases and reports from our field station personnel.

I trust the above will assist you in conducting your study.

Sincerely yours,

*Howard M. Denney*  
HOWARD M. DENNEY  
Assistant General Counsel

Enclosures



ASSISTANT ATTORNEY GENERAL

Department of Justice  
Washington, D.C. 20530

MAR 21 1972

Mr. Albert Foer  
Associate Editor  
University of Chicago Law Review  
1111 East 60th Street  
Chicago, Illinois 60637

Dear Mr. Foer:

This is in response to your letter to Mr. Kleindienst regarding the study that you are making of the operations of the Fair Credit Reporting Act, P.L. 91-508, Title VI; 84 Stat. 1127; 15 U.S.C. 1681 ("the Act").

The letter asks a number of factual questions about consumer reporting agencies and government investigations. Your questions were referred to the FBI which has furnished us with the following answers.

1. What degree of reliance is placed on information from consumer reporting agencies?

With enactment of the Act, credit files became unavailable as investigative resources in criminal and security investigations. The FBI responded to the limitations of the statute by discontinuing credit bureau file checks as a routine investigative technique in other than employment cases. Credit information obtained under the exceptions provided in the statute is identified so that it will not be used subsequently for purposes other than those permitted by the law.

2. Has the Act increased the cost of investigations?

While precise accounting is not available, the FBI feels that the restrictions imposed by the Act have generally increased time and manpower costs.

V. Correspondence from Department of Justice

-2-

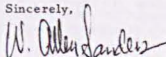
restrictive provisions were brought to the attention of all Postal Inspection Service personnel with instructions to discontinue obtaining or reviewing credit reports, and, thereafter, such reports were no longer relied upon for investigative purposes.

Although the Fair Credit Reporting Act has limited our quick access to certain probative and other helpful data and has increased the overall cost of investigations, we have no means of accurately estimating the increased cost. Additionally, it has the effect of reducing to some extent the thoroughness of some of our investigations from the standpoint of bringing all possible facts together for analysis.

The resourcefulness of Inspectors has resulted in the development of alternate means of obtaining appropriate information, however, it is difficult to quantify the effectiveness of these means. Certainly, they are more time consuming than was the case when such data was obtainable at one source.

I hope this answers your questions.

Sincerely,



W. Allen Sanders  
Assistant General Counsel  
Legislative Division



It is conceded, for example, that the government is limited in obtaining information from consumer reporting agencies by § 604 of the Act, 15 U.S.C. 1681b. However, the definition of "consumer reporting agency" includes words of limitation which appear to exclude the FBI from the definition. The FBI does not furnish information outside the government for monetary fees. Moreover, the term "cooperative non-profit basis" is not applicable to the reporting activities of Federal agencies. "Cooperative non-profit basis" is generally understood to refer to the functions of private associations that provide services to their members on a mutually beneficial basis, such as the cooperative credit bureaus which exist in this field.

The letter of April 7, 1970 to which you refer from Deputy Attorney General Kleindienst to Leonor K. Sullivan, Chairman of the Subcommittee on Consumer Affairs of the House Banking Committee confirms this. (The text of the letter appears in Fair Credit Reporting, Hearings on H.R. 16340 before the subcommittee on consumer affairs of the House Committee on Banking and Currency, 91st Cong., 2d Sess. (1970) at page 605.) The letter states in pertinent part:

Another factor which warrants close Committee consideration is the possibility that the definition of "consumer reporting agency" in H.R. 16340 may be read to include agencies of Government. This is obviously not intended and so we would suggest some limiting language such as that used on page 5, lines 10 and 11, of S. 823. Certainly, there is no intention to require the F.B.I. or other agencies of Government to open their files to all persons whose names appear in them.

At the time that this letter was written S. 823 had already passed the Senate and had been introduced in the House. The Senate bill at p. 5, lines 10 and 11, included the language limiting the definition of "consumer reporting

3. To what extent have substitute means of obtaining similar information been found?

The estimate given above that costs have been increased is based on the fact that investigative leads now must be developed, if they are available at all, though various alternatives involving direct interviews of numerous possible sources seeking the one having relevant information.

4. How often do banks utilize FBI fingerprint checks?

While statistics concerning the total number of fingerprint checks requested by banks are not readily available, employment application fingerprint identification service is available by law and regulation (Public Law 92-184; 28 C.F.R. 0.85(b)) to federally insured or chartered banks.

You have also raised a legal question as to whether a government agency such as the FBI may be a consumer reporting agency within the meaning of the Fair Credit Reporting Act, P.L. 91-508, Title VI, 84 Stat. 1127, 15 U.S.C. 1681. The Office of Legal Counsel cannot furnish you with an official legal opinion on this question since we are limited by law to providing such opinions to officers of the Executive branch acting in their official capacities. However, we offer the following analysis for your information.

The Act defines consumer reporting agency as any person which "for monetary fees, dues, or on a cooperative nonprofit basis" regularly engages in assembling consumer credit information for the purposes of "furnishing consumer reports to third parties." 15 U.S.C. 1681a(f). An example of dissemination to a third party, i.e., outside the government, by the FBI could be the employment applicant fingerprint service available to Federally insured banks pursuant to P.L. 92-184.

It is true that the Act includes a general definition of "person", 15 U.S.C. 1681a, that covers government agencies and that some sections may apply to such agencies.




It may be noted that legislation has been proposed by the Administration which would provide new rights for individuals to examine records maintained by the government. On September 20, 1971, the Attorney General sent to Congress the "Criminal Justice Information Systems Security and Privacy Act of 1971," which has been introduced as H.R. 10789. Section 3(c) of the bill provides:

(c) An individual who believes that criminal offender record information concerning him is inaccurate, incomplete, or maintained in violation of this Act shall, upon satisfactory verification of his identity, and in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

Thus, some of the same sort of protection afforded to consumers against private investigative agencies would, under the bill, be provided in the government field as well.

Sincerely,



Ralph E. Erickson  
Assistant Attorney General  
Office of Legal Counsel

agency" to enterprises acting "for monetary fees, dues, or on a cooperative nonprofit basis," which now appears in the Act. (See S. 823, November 12, 1969, as referred to the House Comm. on Banking and Currency, printed at page 15 of House hearings, *supra*.) The bill introduced by Congresswoman Sullivan, H.R. 16340, did not, as noted in the letter, include similar language. See page 2 of House hearings, *supra*. \*/ The Department's view was that the addition of this language would make it clear that government agencies did not fall within the definition.

There is nothing in the subsequent legislative history which suggests that anyone took issue with the Department's position. The findings and purpose set out by the Congress at the beginning of the Act reflect the view that Congress was concerned with commercial interests and not with the practices of government agencies. Sec. 602, 15 U.S.C. 1681. The entire tenor of the legislative history reflects a concern with private rather than public agencies.

The whole question of disclosure of government files was the recent subject of searching debate when the Freedom of Information Act was passed. 5 U.S.C. 552. It hardly seems likely that Congress in passing the Act would have radically upset or altered the equilibrium and compromise achieved by the Freedom of Information Act without indicating that it had an intention to do so.

\*/ H.R. 16340 was not reported out by the Committee. Instead, another bill which did not include a provision dealing with credit agencies, H.R. 15073, was reported out. H. Rep. No. 91-975. That bill, in substantially similar form was introduced in the Senate as S. 3578. It was amended on the Senate floor to include the provisions relating to credit agencies and then adopted as an amendment in the nature of substitute for H.R. 15073. What became the present Act was then agreed to by the House in conference. H. Rep. 91-1587, p. 25.



## APPENDIX SEVEN

*OBSOLETE DATA PROCEDURES, SELECTED CONSUMER  
REPORTING AGENCIES, CHICAGO*I. *CREDIT BUREAUS*A. *Manual*

1. Chicago Credit Bureau  
Everything over 10 years old destroyed. Personnel trained to avoid giving out statutorily obsolete data.
2. Credit Bureau of Western Cook County  
On-going manual purging. Also, obsolete data destroyed as encountered in response to inquiries.
3. Hale-Prietsch Services  
Obsolete data retained, not segregated in file. Supervisor reads and pulls obsolete data before passing file to reported, unless section 605(b) exceptions apply. Reported double-checks. Chapter 13 bankruptcies considered under 14 year limit.

B. *Computerized*

1. Credit Information Corporation of Chicago  
All information programmed out prior to statutory limit. Chapter 13 bankruptcies kept only 7 years. Inquiry records kept 10 years.
2. Hooper-Holmes Credit Index  
All information purged within 5 years.
3. TRW Credit Data  
All information programmed out of computer prior to statutory limit.

II. *INSPECTION BUREAUS (All Manual)*

1. American Service Bureau  
Favorable information destroyed after 13 months. Adverse information retained 5 years.
2. Illinois Service Bureau  
Copy of report destroyed after 2 years, including derogatory information. Files containing newspaper clippings and order tickets kept 5 years. Daily manual weeding.
3. Insurance Inspections, Ltd.  
All information destroyed after 13 months.
4. Retail Credit Co.  
Files destroyed after 13 months, except that significant adverse data kept 5 years. Bankruptcy data kept 10 years. A file with highly sensitive data, e.g. concerning crime syndicate, retained longer, but obsolete data not reported.
5. Underwriters Reports, Inc.  
Oldest information is 2 years, except for adverse information. Too costly to purge manually. Manager checks each file when it is pulled before passing it to an inspector.

*Sources:* See profiles of the respective bureaus in Appendix One.



## APPENDIX EIGHT

*SAMPLE FORMS USED BY INSPECTION BUREAUS*

- I. Tenant Home Owners Report, Blank Form, Retail Credit Co., 1968.
- II. Comprehensive-Homeowners-Tenants Report, Blank Form, Insurance Inspections, Ltd., 1972.
- III. Personnel Selection Investigation, Specimen Report\*, Retail Credit Co., 1965.
- IV. Fire-Report-Dwelling, Sample Form, O'Hanlon Reports, 1964.


*Note:* For a sample of an American Service Bureau "Special Service Life Report", see Senate Hearings on S. 823 (Fair Credit Reporting) before the Subcommittee on Financial Institutions of the Committee on Banking and Currency, 91st Cong., First Session (May 19, 1969), at 278-279.

\*All names, locations, and information appearing in this Specimen Report are fictitious.



I. Tenant Home Owners Report, Blank Form,  
Retail Credit Co., 1968.

RETAIL CREDIT COMPANY  
TENANT HOME OWNER'S REPORT



CONFIDENTIAL

Acct. No. RE-APT.  
Pub. No.

DATE: OFFICE

NAMES: Amount of Dwg.: 1  
Amount of Bkg.: 1

MAILING ADDRESS:

PROPERTY IMPROVEMENTS  
(If other than above)

ATTACHED if Photos  
(If more than one)  
NOT REQUIRED  
NOT AVAILABLE (Explain Below)

Date of Report	Previous Reports	No. of Years Since To Insure	Interview? If so, whom?
<b>BUSINESS-PERSONAL</b>			
1. Ret. Age	1. _____	<b>LOSSES</b>	
2. Occupation	2. _____	28. Any past fire losses?	28. <input type="checkbox"/> No <input type="checkbox"/> Yes
3. Employer	3. _____	29. Any past theft losses?	29. <input type="checkbox"/> No <input type="checkbox"/> Yes
4. How long employed	4. _____	30. Any past liability losses?	30. <input type="checkbox"/> No <input type="checkbox"/> Yes
5. Approximate annual income	5. \$ _____	31. Any other past property losses?	31. <input type="checkbox"/> No <input type="checkbox"/> Yes
6. Approximate net worth	6. \$ _____	<b>EXPOSURE</b>	
7. Marital status	7. _____	32. Any fire hazard on, or near premises?	32. <input type="checkbox"/> No <input type="checkbox"/> Yes
8. If married, is spouse employed?	8. <input type="checkbox"/> No <input type="checkbox"/> Yes	33. Premises unoccupied during the day?	33. <input type="checkbox"/> No <input type="checkbox"/> Yes
9. If fire, theft, etc., someone shares living quarters with insured?	9. <input type="checkbox"/> No <input type="checkbox"/> Yes	34. Recreative travel or secondary residence?	34. <input type="checkbox"/> No <input type="checkbox"/> Yes
10. Total number of dependents	10. _____	35. Renovations frequency?	35. <input type="checkbox"/> No <input type="checkbox"/> Yes
11. Ages of children at home	11. _____	36. Any servants?	36. <input type="checkbox"/> No <input type="checkbox"/> Yes
12. Any criticism of personal or family reputation?	12. <input type="checkbox"/> No <input type="checkbox"/> Yes	37. Domestic animals?	37. <input type="checkbox"/> No <input type="checkbox"/> Yes
13. Any criticism of associates?	13. <input type="checkbox"/> No <input type="checkbox"/> Yes	38. Own boat and/or motor?	38. <input type="checkbox"/> No <input type="checkbox"/> Yes
<b>BUILDING</b>			
14. Type dwelling (1 family, duplex, apt. house, etc.)	14. _____	39. Any evidence of lack of pride in ownership or maintenance?	39. <input type="checkbox"/> No <input type="checkbox"/> Yes
15. Approximate age of dwelling	15. _____	40. Any danger from flooding or landslides?	40. <input type="checkbox"/> No <input type="checkbox"/> Yes
16. Number of stories	16. _____	<b>APARTMENT HOUSE (Answer only if a 3 or more unit bldg.)</b>	
17. Construction (frame, brick, etc.)	17. _____	1. No. of units?	1. <input type="checkbox"/> No <input type="checkbox"/> Yes
18. Are dwelling and premises in poor condition?	18. <input type="checkbox"/> No <input type="checkbox"/> Yes	2. Any vacancies?	2. _____
19. Any business conducted from premises?	19. <input type="checkbox"/> No <input type="checkbox"/> Yes	3. On what floor does insured reside?	3. _____
<b>NEIGHBORHOOD &amp; PROTECTION</b>			
20. Status of neighborhood? (improving, stable, deteriorating)	20. _____	4. Number of rooms in subject's apartment?	4. _____
21. Any unusual neighborhood hazards? (vandalism, looting, etc.)	21. <input type="checkbox"/> No <input type="checkbox"/> Yes	5. Elevator (attended or self service, or walkup)?	5. _____
22. Is property outside city limits?	22. <input type="checkbox"/> No <input type="checkbox"/> Yes	6. Is there a doorman?	6. <input type="checkbox"/> No <input type="checkbox"/> Yes
23. Is police protection inadequate?	23. <input type="checkbox"/> No <input type="checkbox"/> Yes	7. Does bldg. have a common entrance?	7. <input type="checkbox"/> No <input type="checkbox"/> Yes
24. Street lighting poor?	24. <input type="checkbox"/> No <input type="checkbox"/> Yes	8. If yes, is it kept unlocked?	8. <input type="checkbox"/> No <input type="checkbox"/> Yes
25. Dwelling isolated?	25. <input type="checkbox"/> No <input type="checkbox"/> Yes	9. How many entrances to insured's apartment?	9. _____
26. Property ever inaccessible?	26. <input type="checkbox"/> No <input type="checkbox"/> Yes	A. Are doors (wood, metal, glass, mixed)?	A. _____
<b>VALUES (If unable to interview or otherwise determine, explain in remarks.)</b>			
27. Own articles or collections of great value?	27. <input type="checkbox"/> No <input type="checkbox"/> Yes	B. Door locks (spring, B. deadlock, jimmy proof deadlock, etc.)	B. _____
28. Estimated value of fur and jewelry?	28. \$ _____	C. Any other protective devices?	C. <input type="checkbox"/> No <input type="checkbox"/> Yes
29. Estimated value of other personal property?	29. \$ _____	9. Are any windows accessible from the ground or a fire escape?	9. <input type="checkbox"/> No <input type="checkbox"/> Yes
Quote any possible previous carrier. Remarks: Specify any "Yes" answers. If any insure give date and circumstances. If insured had animals, are they fierce or unmanageable? If so, what breeds?			







arm. This condition has completely healed and his appearance is entirely normal. He has displayed no nervousness as a result of this injury, though this arm is easily fatigued. We learn of no other health history.

He uses intoxicants on a moderate and infrequent basis. He has never been known to drink to excess or use drugs.

**FINANCES:** Subject lives within his means and maintains close control over his finances; no known financial difficulty. He draws disability payments from the government as a result of his service connected injury. Former employment records indicate the amount to be \$50 a month.

**PERSONAL-REPUTATION:** Mr. Carleton is married and lives with his wife and infant daughter in a rented duplex located in a well kept, stable, middle-class area. He has lived at his present address for the past two years. Prior to this he lived in a well kept, lower middle-class section located on the east side of this city. He is well thought of at both locations and his associates are desirable. His driving reputation is favorable. He is regarded as an individual with high moral standards and good character. Although the subject spends most of his leisure time with his family, we also learn he is active in the local American Legion Post where he holds the position of Treasurer. Wife's attitude and influence would be considered helpful to subject.

CEB

RETAIL CREDIT COMPANY  
Report Of  
**PERSONNEL SELECTION  
INVESTIGATION**



**CAUTION TO CUSTOMER:** Under the terms of my agreement, this report is submitted with the understanding that it is to be held in STRICT CONFIDENCE. Under no condition is information in this report to be passed on directly or indirectly to the person reported on.

Act. No. 01234      For Mr. or Requester      **M. D. Smith**      Completed by      **LITTLE ROCK**      office  
2-15-55      15      **DEAN**      **PERSONNEL REPORT**  
CARLETON, JAMES      ☐ Special Personnel Report  
Little Rock, Arkansas, 72 W. Second St.  
Asst. Manager-Hilldale Dairy      ☒ Regular Personnel Report

Age of      12-2-37      Social Security #:      000-00-0000

**SCOPE OF INVESTIGATION**

This investigation was conducted in Little Rock, Arkansas, subject's present address. One former employer, present residence address, and one former residence address were covered.

**SOURCES**

Contact was made with a former supervisor knowing 4 years, two present residence neighbors knowing 1 and 2 years respectively, and two former residence neighbors knowing 7 years each.

**OTHER OFFICES INVESTIGATING**

No concurrent handling

**REPORT OF INVESTIGATION**

**EMPLOYMENT RECORD:**

8-21-63 to Present      James D. Carleton is presently employed by this local dairy as Assistant Manager of their bottling plant. At your instruction, we have not contacted this firm, however, we have been able to verify this employment through personal sources.

6-15-59 to 8-16-63      This farm equipment sales firm reports applicant worked for them during the dates shown as a serviceman, repairing farm machinery. He was conscientious, applied himself well, and was rated as a good mechanic. He was particularly skilled in minute assembly work. His salary was \$80 per week and attendance was regular. Management and fellow workers were sorry to see him resign; however, he found the work too strenuous, due to having only limited use of his left arm. This condition is the result of an injury incurred while in military service. He is eligible for rehiring in a more suitable capacity.

**EDUCATION:** Applicant is not known to have attended local schools during the past five years. Employment record shows him to be a high school graduate.

**HEALTH-HABITS:** Prior to entering the service, applicant enjoyed the best of health and was unimpaired. As a result of a field mine accidentally exploding near him while on training maneuvers at Ft. Leonard Wood, Mo., he has only about 75% use of his left arm. Injury occurred in 1957, followed by several operations in Army hospitals, resulting in a metal sleeve being substituted for a shattered portion of bone in the upper

RETAIL CREDIT COMPANY  
Form 100-444 U.S.A.

(OVER)

Report of  
**PERSONNEL SELECTION INVESTIGATION**

III. Personnel Selection Investigation, Specimen Report,  
Retail Credit Co., 1965.

PERSONAL INFORMATION MARKET



1964.

H.C.

2-18-64 eg/lr CHICAGO OFFICE (Baren)



## APPENDIX NINE

*PRE-NOTIFICATION AND FURTHER INFORMATION*

- I. Pre-notification Hand-out, Aetna Life & Casualty.
- II. Pre-notification Letter\*
- III. Response to Request for Additional Information Under Section 606(b)\*

- I. Pre-notification Hand-out,  
Aetna Life & Casualty.

LIFE & CASUALTY

**Aetna**

NOTICE REQUIRED UNDER THE FAIR CREDIT REPORTING ACT

Thank you for considering the Aetna Life Insurance Company as your insurer. In compliance with The Fair Credit Reporting Act we are informing you that as part of our routine procedures in investigating consumer report including information as to character, general reputation, personal characteristics and mode of living may be made.

Under the Act, you have the right to make a written request within a reasonable time for an additional disclosure concerning the information reported on your credit report. Such request should be made to the credit reporting agency or to the person furnishing the report. You may also request that the investigation, which may include personal interview, concerns residence verification, marital status, number of children, economic status, employment, occupation, general health, habits, reputation and mode of living.

• 19 •

**AETNA LIFE INSURANCE COMPANY**  
HARTFORD, CONNECTICUT 06115

(27861) 8-73

\*(facsimile of form letter used by a major insurance company)



## II. Pre-notification Letter

Dear

RE:

As a regular part of our business we develop certain facts necessary for proper rating and thorough underwriting, sometimes we seek to verify this information by ordering an investigative report from an unbiased third party.

In order to properly rate and underwrite your account we have ordered such an investigative report on you. The information will be obtained through personal interviews with third parties such as family members, business associates, financial sources, friends, neighbors or others with whom you're acquainted.

The report will be used to determine your insurability and will include, as applicable, information as to character, general reputation, personal characteristics and mode of living. If you want additional information on the nature and scope of this report, please return this form promptly to us at the address shown below and we will furnish it.

## III. Response to Request for Additional Information Under Section 606(b).

Dear

Re:

This is in response to your request for additional information about the investigative report we advised you was being made.

The ordering of reports is a routine procedure. These investigative reports include general identification information such as residence verification, marital status and number of children. They may also include information on employment, occupation, general health, habits, reputation and mode of living.

When insurance coverage for automobile, other personal property or real property is involved, the information may include a physical description of the property, its condition and uses, and any losses or claims. In addition, we may obtain information on outstanding judgments, liens, and any physical impairments, losses or violations they may have suffered may also be included.

The information will be developed in whole or in part from personal interviews with third parties such as family members, business associates, financial sources, friends, neighbors, or others with whom you are acquainted.

Yours very truly,



## APPENDIX TEN

*AUTHOR'S APPROACH AND METHODS OF RESEARCH*

Although my intention was to be as scientific as possible, after a year in the vineyards I have to admit that science, in a study of this nature, turns out to mean little more than gathering as much information as possible from the greatest possible variety of sources, and then attempting to evaluate it with as much sophistication and judgment as one can muster. To study an industry like the personal information market, much of which has traditionally been shrouded in secrecy, where statistics are almost entirely lacking, where many informants must be promised confidentially, and where the subpoena power is the researcher's pipe dream, required more art than science.

The major source of information upon which this article is based was the personal interview. During the last two months of 1971, I sought out users of consumer reports in Chicago. These included retailers, insurance companies, banks, savings and loan institutions, finance companies, real estate companies, and government agencies. Executives or counsel of 40 such units were personally interviewed by the author or an associate. These interviews followed a prepared pattern and lasted an average of one hour, focusing on the uses and sources of consumer reports and the perceived impact of the FCRA. Another 40 consumer report users were interviewed in less depth by telephone. Respondents were informed that publication was intended and that they might request confidentiality.

Based upon this interview experience, a four-page questionnaire was prepared and mailed to 200 additional consumer report users. "The replies to our questionnaires soon illustrated that questionnaires are utterly useless in a fact-finding study of this kind." \* An insignificant percentage of potential respondents were willing to utilize our stamped, self-addressed envelopes.

During the first two months of 1972, attention was shifted to the consumer reporting agencies in Chicago. Executives of 6 credit bureaus and 8 inspection bureaus were interviewed for an average of 3 hours each. Executives of an additional 9 consumer reporting agencies were interviewed over the telephone. Many of those interviewed were of continuing help throughout the project, answering additional questions as they occurred and serving as a sounding board for my observations and proposals. Considering the reputation of the credit bureaus and inspection bureaus for secrecy, I was amazed to find this degree of openness and cooperation. Only a few firms refused to be interviewed.

The basic footwork in Chicago was supplemented in many ways, beginning with a thorough search of the literature on privacy, credit bureaus, insurance underwriting, and the FCRA. Contact was established with consumer groups and privacy-concerned individuals around the nation. Some correspondents produced documentation of abuses in the personal information market. Others provided internal documents from various consumer reporting agencies, obtained in ways which I can only imagine. Additional sources included former insurance inspectors and credit bureau employees, detectives, insurance agents

---

\* S. DASH, *THE EAVESDROPPERS* 9 (1959).



and underwriters, Congressional staff members, and Federal Trade Commission attorneys in Chicago and Washington. In all, over 250 people were consulted.

Many, if not all, of my sources had a point of view to sell. A former insurance inspector, for instance, might give biased information if he had been fired from his job. Facts, I found, rarely exist in pristine form; rather, there are tendencies of opinion and observation which point in particular directions. I have attempted to be alive to my own prejudices and those of my sources, eliminating information (except in Appendix One) which could not be verified from other sources. To foster objectivity, I submitted drafts to a variety of experts in the various fields involved, including persons less than sympathetic to my objectives. I am grateful to them all, but take full responsibility for the results, some of which will certainly not appeal to all my correspondents.

My own prejudices must not be overlooked. Objectivity can carry a writer only so far when his material requires constant evaluation as to truth or significance. I start with the belief that the best society is one where diversity is encouraged, where debate is vigorous, and where spontaneity is undampened by the lurking fear that someone is watching and taking notes. The invasion of privacy is, in a word, a matter of serious concern to me. On the other hand, I've grown up on a consumer credit society (my father is a retailer with much credit business), and I make full use of the benefits of credit cards and charge accounts. My approach, therefore, assumes the continued existence of consumer credit in its various forms. Nor do I believe that insurance companies should accept all risks without any attempt to evaluate them. I believe that credit bureaus and inspection bureaus can serve a useful purpose; my objective is to seek ways in which that purpose can be served without unduly violating individual privacy.

I chose Chicago as the locus of the study because I was attending the University of Chicago Law School. As a financial, retail, mail-order, and insurance center, Chicago provided a wealth of subjects to study. Indeed, Chicago is not typical of the personal information market, because there is so much competition, so much activity. Where other cities have only one or two credit bureaus and a couple of inspection bureaus, Chicago has over 20 credit bureaus and almost as many inspection bureaus. This unusual degree of competition imposes upon the empirical part of the study, but should not affect my observations and recommendations concerning the FCRA.



## DIETHYLSTILBESTROL

Joyce E. Breiman\*

### EDITOR'S NOTE

On April 27, 1973, the Food and Drug Administration announced the withdrawal of all authorization for the use of diethylstilbestrol in food-producing animals.<sup>†</sup> While the following article was prepared prior to that date, its impact is not affected by the FDA ruling. For one thing, it is very likely that the ruling will be appealed in the courts by the drug manufacturers, and such appeals will probably involve many of the same issues and research findings discussed below.

Of greater importance within the context of this Journal, though, is the fact that the diethylstilbestrol problem is not an isolated one, occurring because it was unexpected and the appropriate agencies lacked machinery to deal with it. On the contrary, the greater concern is not for diethylstilbestrol per se (as alarming as that may be in itself), but that the administrative and legal processes involved work slowly, unevenly, and often provide guidance and protection to no one -- not the drug manufacturer nor the livestock producer, who are often left without clear and reasonable guidelines, and certainly not the public-at-large whose health is the chief reason that any controls at all are placed upon drugs administered to food producing animals.

Already advertising campaigns are being mounted by drug companies to induce livestock producers to use substitutes for diethylstilbestrol which may prove to be equally undesirable, and perhaps even more so. Thus, the problem is a continuing one. Even if the FDA ban on diethylstilbestrol is upheld in the courts, issues similar to those discussed below will likely also arise with respect to the substitute drugs.

---

\* A.B., University of California at Berkeley; J.D. 1972, Loyola University of Los Angeles, School of Law.

† 38 Fed. Reg. 10926 (1973). This ruling withdrew all new drug applications for the use of diethylstilbestrol in animal implants. As will be seen below in the text, the use of this drug in animal feed was earlier prohibited. At the present time, therefore, all uses of diethylstilbestrol in food producing animals have been banned. The April 27 ruling was based on

... new Department of Agriculture tests that detected residues of DES (diethylstilbestrol) in livers and kidneys of animals slaughtered 120 days after the synthetic estrogen was implanted in their ears.

Los Angeles Times, April 26, 1973, pt. I, at 9.



## INTRODUCTION

Diethylstilbestrol, often called stilbestrol or DES, is a synthetic female sex hormone first developed in 1938.<sup>1</sup> Although once limited to specific clinical uses,<sup>2</sup> continued research indicated that the administration of this drug to chickens and cattle resulted in more efficient feed conversion with a corresponding weight gain in the animals treated.<sup>3</sup> With governmental approval, DES became widely used on animals bred for human consumption.<sup>4</sup>

This article will explore the complicated medical, legal, and legislative history of DES and will review the dangers of its widespread and relatively casual administration to beef-cattle. It will also demonstrate the need for continuing consumer action to enforce already existing legislation which clearly prohibits the use of DES in food-producing animals.

In 1941, the Food and Drug Administration (FDA), acting under the "new drug" section of the 1938 Federal Food, Drug, and Cosmetic Act, permitted eleven firms to begin marketing DES for clinical use.<sup>5</sup> Six years later an application for the use of DES pellet implants in poultry was allowed to become effective.<sup>6</sup> In November, 1954, the FDA approved the first application for the daily use of 10 milligrams (mg.) of DES to be added to feed for fattening cattle weighing at least six-hundred pounds.<sup>7</sup> Subsequently, in 1955, the use of DES pellets for implantation in the ears of cattle was permitted.<sup>8</sup> By 1958, DES was routinely added to 75% of all feed for beef-cattle in feed lots.<sup>9</sup>

---

1. Parkes, Dodds & Noble, *Interruption of Early Pregnancy by Means of Orally Active Oestrogens*, BRIT. MED. J. 557 (1938). See also J. MEIGS & S.H. STURGIS, PROGRESS IN GYNECOLOGY 499 (1946). Two compounds were synthesized by Dodds: one, stilbestrol, which is relatively inactive; and the other, diethylstilbestrol, which is highly active. See note 25 *infra*, and accompanying text. Some pharmaceutical companies, however, use the trade name "stilbestrol" for the more active hormone, diethylstilbestrol (DES). These terms are used interchangeably in this article as referring to DES.

2. *Hearings on H.R. 7624 and S. 2197, the Color Additives Amendment to the Federal Food, Drug, and Cosmetic Act, before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2nd Sess. at 69 (1960) [hereinafter, 1960 *Hearings*]. Statement of Arthur S. Flemming, Secretary of Health, Education, and Welfare.

3. Ringuette, *Medicated Animal Feeds of the Food Additives Amendment of 1958: A Case Study*, 15 FOOD DRUG COSM. L.J. 320 (1960).

4. See generally 1960 *Hearings*, *supra* note 2, at 69-70.

5. *Id.* at 69.

6. *Id.*

7. T. Byerly, *hormones in Feed*, PROCEEDINGS OF THE SYMPOSIUM ON MEDICATED FEEDS, BEFORE THE VETERINARY MEDICAL BRANCH OF THE FOOD AND DRUG ADMINISTRATION 17 (H. Welch & F. Marti-Ibanez eds. 1956) [hereinafter, SYMPOSIUM].

8. 1960 *Hearings*, *supra* note 2, at 70.

9. Ringuette, *supra* note 3, at 320. In the 1960 *Hearings*, *supra* note 2, Secretary of HEW, Arthur S. Flemming, estimated that "...80 to 85 percent of the beef cattle are now fed on feed containing stilbestrol." *Id.* at 70.



Although use in poultry was discontinued in 1959,<sup>10</sup> it is conceivable that virtually all beef-cattle received medicated feed,<sup>11</sup> implants, or both until January 1, 1973. As of that date, by order of the Department of Health, Education and Welfare (HEW), the use of DES in feed was to be discontinued.<sup>12</sup> This order did not apply to DES implants and, in fact, it specifically stated that its purpose was to allow the industry sufficient time to convert the drug to use in implants rather than feed.<sup>13</sup>

The argument for allowing the use of DES is based upon the theory that it allows a greater efficiency of feed conversion, resulting in the production of more and better meat at less cost to the producer and consumer. The Department of Agriculture has estimated that to prohibit the use of DES would cost consumers up to \$460,000,000 annually.<sup>14</sup> There seems little question that DES results in financial gain to the cattle raiser, but the savings to the consumer have been estimated to amount to no more than \$2.30 per person, per year.<sup>15</sup>

Furthermore, there is evidence which suggests that DES does not result in better quality food. Carcasses of treated animals do not grade consistently to the same standard of quality as do carcasses of non-treated animals; rather, reduced carcass quality is common after DES

10. *Bell v. Goddard*, 366 F.2d 177, 179 (7th Cir., 1966). The FDA issued a final order prohibiting the use of DES implants in poultry in 1961, but the manufacturers of DES poultry implants had agreed to suspend the sale of their products as early as December, 1959. *Id.*, court's footnote 3. See text at notes 108-112, *infra*.

11. *Cf.* note 9, *supra*. The results of a telephone survey conducted by the author indicate that from 75 to 99 percent of beef cattle received such feed. The agencies contacted are: Veterinary Medical Officer, State of California, Department of Agriculture, Bureau of Animal Health, Los Angeles, Nov. 19, 1970; Senior Meat Inspector, California Department of Agriculture, Bureau of Meat Inspection, Los Angeles, Nov. 19, 1970; Senior Inspector, California Department of Agriculture, Field Agriculture and Chemical Division, Los Angeles, Nov. 20, 1970; California Cattle Feeders Assoc., Bakersfield, California, Nov. 20, 1970; Persons in the meat packing industry, Los Angeles, Nov. 20, 1970; State Farm and Home Advisor, University of California at Los Angeles, Nov. 20, 1970 (who indicated that such records are simply not kept). Stated estimates did vary from 75 to 99 percent. In July, 1971, the California State Department of Agriculture estimated that 90 percent of cattle in feed lots are fed either DES or other growth stimulants. *Western States Meat Packers Assoc., Inc., Bulletin No. 1309* (1971).

12. 37 Fed. Reg. 15747, 15749 (1972). See also 37 Fed. Reg. 26307 (1972).

13. *Id.* at 15748. For discussion of the legality of the Commissioner's allowing time for the phaseout of DES in feeds, see *Hearings on the Regulation of Diethylstilbestrol (DES) (Its use as a drug for humans and in animal feeds) before the Intergovernmental Relations Subcommittee of the House Committee on Governmental Operations*, 92nd Cong., 2nd Sess., pt. 3, at 417 *et seq.* (1972) [hereinafter, Aug. 1972 Hearings].

14. *Western States Meat Packers Assoc., Inc., Bulletin No. 1309* (1971).

15. *Id.* See also *Hearings on the Regulation of Food Additives and Medicated Animal Feed before the Subcommittee on Intergovernmental Relations of the House Committee on Governmental Operations*, 92nd Cong., 1st Sess. at 445-458 (1971) [hereinafter, March 1971 Hearings]. Estimated cost increases due to the non-use of DES are stated for various situations. All such increases are qualified as being subject to over-estimation. And see *Hearings on the Regulation of Diethylstilbestrol (DES) (Its use as a drug for humans and in animal feeds) before the Intergovernmental Relations Subcommittee of the House Committee on Government Operations*, 92nd Cong., 1st Sess., pt. 2, at 253 (1971) [hereinafter, Dec. 1971 Hearings], where it was asserted by Dr. C.D. VanHouweling, Director, Bureau of Veterinary Medicine, Food and Drug Administration, that the cost increase to the consumer due to the non-use of DES would amount to \$3.85 per person annually.



implantation or feeding.<sup>16</sup> It has been found that cattle treated with DES often develop cover fat, sometimes to excess, without corresponding marbling through the lean meat, with the meat becoming watery.<sup>17</sup> In fact, there is evidence that the extra weight gain may be due to water retention, indicating that the consumer is actually paying for extra water.<sup>18</sup> Similar criticisms had been raised regarding DES treated poultry. In one study the fat of such fowl reportedly differed chemically from that of normally fattened birds; it was watery and "culinarily inferior."<sup>19</sup>

Perhaps the most important consumer issue is the potentially serious health hazards presented by DES. It is an active female sex hormone which, as indicated below, is capable of producing undesirable sex-related physiological effects. Moreover, it is acknowledged to be a carcinogen.<sup>20</sup> At the time that the initial application for DES pellets was allowed to become effective, DES had been shown to cause cancer in test animals when administered orally.<sup>21</sup> It was believed, however, that no significant residues of the drug would remain in the edible tissues of treated animals, which would thereby endanger the health of consumers. Unfortunately, this did not prove to be the case.<sup>22</sup>

## I. GENERAL CHARACTERISTICS OF DIETHYLSTILBESTROL

*Hormones* are chemical substances secreted into the bloodstream by specific glands. Among these glands are the adrenals, and parts of the ovaries and testes. Secretion hormones are transported through the bloodstream to other parts of the body (so-called *target organs*), where they cause various specialized effects. Hormones are remarkably potent and only minute amounts circulate in the blood. This makes the

---

16. For specific details of reduced carcass quality following DES implantation in lambs and cattle, see REPORT OF THE COMMITTEE ON ANIMAL NUTRITION, AGRICULTURAL BOARD, NATIONAL ACADEMY OF SCIENCES, NATIONAL RESEARCH COUNCIL, HORMONAL RELATIONSHIPS AND APPLICATIONS IN THE PRODUCTION OF MEATS, MILK AND EGGS, at 34-35, No. 714 (Supp. 1959).

17. 1960 *Hearings*, *supra* note 2, at 287 (statement of Sen. John Dingell, reading excerpt from the Western Livestock Reporter). Also, personal interview with a spokesman for the Meat Industry, Los Angeles, Oct. 19, 1970, who stated that treated meat may be recognized by its excessive water content.

18. See L. WICKENDEN, OUR DAILY POISON, 117-119 (1956).

19. LEGISLATIVE RECORD OF 1958 FOOD ADDITIVES AMENDMENT TO THE FEDERAL FOOD, DRUG, AND COSMETIC ACT at 95 (C. Dunn ed. 1958) [hereinafter, LEGIS. REC.].

20. *Hearings on the Regulation of Diethylstilbestrol (DES) (Its use as a drug for humans and in animal feeds) before the Subcommittee on Intergovernmental Relations, of the House Committee on Governmental Operations*, 92nd Cong., 1st Sess., pt. 1, at 43 (1971) [hereinafter, Nov. 1971 *Hearings*]. Statement by Dr. Umberto Saffiati of the National Cancer Institute. Cf. statement of Dr. Charles C. Edwards, Commissioner, FDA, *Id.* at 50.

21. 1960 *Hearings*, *supra* note 2, at 69.

22. See LEGIS. REC., *supra* note 19, at 96.



development of sensitive and accurate assay methods difficult.<sup>23</sup> Furthermore, hormones may diffuse slowly between cells and produce some local effects without entering the bloodstream in detectable quantities.<sup>24</sup>

DES has been estimated to be about four times as potent as the natural estrogen, estradiol, and about ten times as active as estrone.<sup>25</sup> Unlike the natural hormones, however, DES passes unchanged through the portal circulation,<sup>26</sup> rather than undergoing degradation and detoxification in the liver. As a result, the liver's normal protective function is largely ineffective<sup>27</sup> and this may account for some of the toxic effects of DES.<sup>28</sup>

# 1. *DES as a Cause of Cancer*

A *carcinogen* is defined as "any agent which tends to promote... [or] accelerates the development of cancer..."<sup>29</sup> Stronger carcinogens, by their very strength, are subject to almost certain clinical discovery,<sup>30</sup>

23. Hormones are discussed generally in REPORT OF THE COMMITTEE ON ANIMAL NUTRITION, *supra* note 16, at 14. For a discussion of the problems involved in detecting hormonal residues in animal tissues, see text *infra* at notes 141-150.

24. REPORT OF THE COMMITTEE ON ANIMAL NUTRITION, *supra* note 16, at 14.

25. A. OSAL, R. PRATT & M. ALTSCHULE, THE UNITED STATES DISPENSATORY AND PHYSICIANS PHARMACOLOGY (26th ed. 1967). Cf. Dodds, *Stilbestrol*, CXLII THE PRACTITIONER 309, 312 (1939), in which DES is estimated to be three to four times as active as estrone when administered subcutaneously, and almost as active as estrone when given orally.

*Estrogen* is a generic term applied to any substance, whether naturally occurring or synthetic, that exerts biological effects characteristic of estrogenic hormones (e.g., secondary sex characteristics). The name is derived from the ability of such substances to induce estrus in lower mammals. STEDMAN'S MEDICAL DICTIONARY (22nd ed. 1972). There are three major, naturally occurring estrogens in the human female: estradiol, estrone, and estriol. R.W. KISTNER, GYNECOLOGY PRINCIPLES AND PRACTICES 556 (1964).

26. The *portal circulation* refers to the circulation of blood between the liver and the small intestine via the portal vein. STEDMAN'S MEDICAL DICTIONARY (22nd ed. 1972).

27. See A.H. CURTIS & W. HUFFMAN, A TEXT BOOK OF GYNECOLOGY 118 (1950).

28. See Shorr, Robinson & Papanicolaou, *A Clinical Study of the Synthetic Estrogen Stilbestrol*, 113 J.A.M.A. 2312, 2315 (1939). See generally MERCK CO., *STILBESTROL* ANN. BIBLIOG. (1941) [hereinafter, MERCK]. A group of women treated with DES (primarily to curb symptoms of menopause) developed toxic reactions to the hormone in the form of nausea, vomiting, and acute psychotic reaction. They demonstrated no tendency to acquire a tolerance to DES. See generally Zondek & Sulman, *Inactivation of Diethylstilbestrol in the Organism*, 144 NATURE 596 (1939).

29. BLAKISTON'S GOULD MEDICAL DICTIONARY (3rd ed. 1972) at 254. See also 1960 *Hearings*, *supra* note 2, at 44, for a summary of a special report prepared by Dr. C. Midler, Associate Director for Intramural Research of the National Cancer Institute. Emphasized in the report are the following:

1. Cancer can be caused by extraneous agents. 2. Not all members of the exposed population are expected to develop cancer, but those more susceptible to cancer cannot be identified except by experience. 3. Even a [known] powerful carcinogen requires weeks or months to elicit cancer in mice or rats and probably requires years in man. 4. No change need be recognizable in the organ or tissue destined to become cancerous before the cancer itself appears.

30. 1960 *Hearings*, *supra* note 2, at 44.



they identify themselves by that very characteristic which makes them dangerous (*i.e.*, the more rapid development of malignant tumors).<sup>31</sup> Less potent carcinogens, paradoxically, are therefore potentially more dangerous, in that their harmful effects may evade recognition.<sup>32</sup> In fact, they are a significant factor in human cancer and present difficult evaluation problems.<sup>33</sup> The effect of certain chemical carcinogens, moreover, can be markedly increased by other compounds which are not in themselves carcinogenic.<sup>34</sup>

Evidence also indicates the irreversibility of a malignant response once initiated and, furthermore, suggests cumulative effects of carcinogenic agents, at least in animals.<sup>35</sup> Thus, the effect of a small dose is not "forgotten" by the organism. Unlike some poisons, carcinogens may not have threshold values.<sup>36</sup> The body is often capable of excreting a small amount of an ingested toxic substance (if it does not do substantial harm initially), but this may not be true of carcinogens, insofar as they are believed to have irreversible cytologic effects.

Evidence exists to show that the time of appearance of tumors after exposure to carcinogenic agents is, within limits, dependent upon the dose and frequency of exposure, but small and often a single dose of carcinogenic agents may elicit tumors, notably after prolonged latent periods. In view of the latter findings, and in view of the summative carcinogenic effect of repeated small doses, concepts of safe threshold doses are dubious where complete control of a hazard involving exposure to carcinogenic agents is desired.<sup>37</sup>

Furthermore, it has been established that

...any of the known human carcinogens takes about 10 to 20 years to produce its specific biological effect--[whereas] in the experimental animal, it requires on the average of a third of the lifespan of the animal to elicit these effects.<sup>38</sup>

---

31. *Id.*

32. The danger lies in the fact that such substances may not be recognized as being potentially harmful. Certainly a substance which produces a malignant growth quickly in a laboratory test animal can be more easily and positively identified as a carcinogen than one which makes its effects known only after a considerable delay. The longer the time of exposure needed to develop a discoverable cancer, the less likely it will be that the actual source can be pinpointed. See 1960 Hearings, *supra* note 2, at 53-55, which includes an excerpt from P. Kotin, *Experimentally Weak Carcinogens*, 18 *CANCER RESEARCH* at 1-3 (1958).

33. 1960 Hearings, *supra* note 2, at 44, and 53-55.

34. *Id.*

35. *Id.* See also SYMPOSIUM, *supra* note 7, at 176.

36. SYMPOSIUM, *supra* note 7, at 176.

37. *Id.* at 9, quoting from the resolutions adopted by the International Union against Cancer; XI ACTA Union International Contre le Cancer, No. 1, 72-76 (1954).

38. Nov. 1971 Hearings, *supra* note 20, at 57 (statement of Dr. Roy Hertz, Senior Physician, Rockefeller University, New York).



A substance that is not normally a carcinogen may disturb the regular functioning of some part of the body in such a way that a malignancy results. For instance, hormones are not normally carcinogenic, but certain cancers (particularly of the reproductive system) have been linked with disturbances of the balance of the sex hormones. There is evidence indicating that estrogens, if allowed to build up to abnormally high levels, may become carcinogenic. Extensive experiments on mice, rats, guinea pigs, and monkeys show that prolonged administration of estrogens, not necessarily at high levels, causes changes in the tissues of the reproductive organs, varying from benign overgrowths to definite malignancies.<sup>39</sup> Thus, even at low dosage levels, estrogens administered over a period of time present a significant threat of cancer, and it is this continuing exposure to minute doses that is to be feared from the introduction of hormones into the food supply.<sup>40</sup>

There is also evidence indicating that human tissue may be susceptible to the same carcinogenic effects observed in animals.<sup>41</sup> Investigators at the Royal Victoria Hospital (McGill University), Canada, discovered that two-thirds of the one hundred-fifty cases of uterine cancer studied had abnormally high estrogen levels.<sup>42</sup> In a later study of twenty cases, eighteen showed similar high estrogen levels.<sup>43</sup>

Because of its estrogenic activity, DES also proved to be a carcinogen;<sup>44</sup> it has been shown to lead to a wide range of pathological changes in animals and humans.<sup>45</sup> In guinea pigs, for example, uterine tumors

---

39. See generally R. CARSON, *SILENT SPRING* (1962). See also 1960 Hearings, *supra* note 2, at 55. In mice, rats, and hamsters the administration of estrogens has been found to induce various forms of cancer. *Id.*

40. See generally Knight, Martin, Iglesias & Smith, *Possible Cancer Hazard Presented by Feeding Diethylstilbestrol to Cattle*, SYMPOSIUM, *supra* note 7, at 167-169.

41. In the Nov. 1971 Hearings, *supra* note 20, Dr. Roy Hertz of Rockefeller University noted that

... all of the known human carcinogens also produce cancer in animals. We cannot say the reverse, but we can say that there is this crossover between human carcinogenesis and animal carcinogenesis to the extent that any substance which is known to produce cancer in humans will also produce cancer in animals, and frequently at the same site...

*Id.* at 57-58. Dr. Hertz also offered this warning:

... when you observe a carcinogenic effect in experimental animals, you had better sit up and take notice as to whether this is going to happen under similar conditions of exposure for similar periods of time in the human subject.

*Id.* at 58.

42. R. CARSON, *SILENT SPRING* 236 (1962).

43. *Id.* See also 1960 Hearings, *supra* note 2, at 55-56.

44. See generally Gerschicker, *Mammary Carcinoma in the Rat with Metastasis Induced by Estrogen*, 89 SCI. 35-37 (1939).

45. G. Knight, W.C. Martin, R. Iglesias, W.E. Smith, *Possible Cancer Hazard Presented by Feeding Diethylstilbestrol to Cattle*, SYMPOSIUM, *supra* note 7, at 167.



have been induced with as little as 1.5 mg. of DES in subcutaneously implanted pellets.<sup>46</sup> In fact, tumors have been induced in guinea pigs exposed to as little as 0.008 mg. of DES per day.<sup>47</sup> A DES pellet removed from a guinea pig one year after implantation has been found to retain sufficient activity to induce a tumor upon reimplantation in another animal.<sup>48</sup> Investigators at the National Cancer Institute found that cancers of the breast can be induced in mice with as little as 0.0007 mg. of DES per day.<sup>49</sup> Fifty percent of male mice, which do not normally develop such tumors, were found to develop breast cancer when exposed to DES.<sup>50</sup> Thus, the carcinogenic effects of DES have repeatedly been demonstrated in test animals, and even extremely low dosage levels have been shown to produce these effects.

DES has also been linked to cancer in humans. Prolonged administration of the hormone as a therapeutic agent has been found to be accompanied by the development of mammary cancer in some male patients.<sup>51</sup> Recent studies have also demonstrated a clear association between the administration of DES to pregnant women and the occurrence of vaginal adenocarcinoma (a rare form of cancer) in their daughters, fifteen to twenty years later.<sup>52</sup> Dr. Herbst of the Massachusetts General Hospital (the *Herbst Report*) studied a number of cases of vaginal adenocarcinoma and found that a significant number of the mothers of these patients had been treated with DES during pregnancy.<sup>53</sup> Later research has substantially corroborated Dr. Herbst's findings.<sup>54</sup> The reason that the mothers themselves did not ultimately develop malignancies was explained by the extreme sensitivity of fetal and neonatal tissues to carcinogenic agents. The dosages used were apparently insufficient to affect the mother, but were in fact capable of inducing cancer in the highly susceptible unborn child.<sup>55</sup>

---

46. *Id.* at 167-168.

47. *Id.* at 168.

48. *Id.* See discussion of implantation *infra*.

49. Knight *et al.*, *supra* note 45, at 168.

50. *Id.* at 168.

51. 1960 Hearings, *supra* note 2, at 55 (Report - *The Role of Certain Chemical and Physical Agents in the Causation of Cancers*, by Dr. G.B. Mider, Associate Director of Research, National Cancer Institute).

52. Herbst, Ulfelder & Poskazner, *Adenocarcinoma of the Vagina*, 284 N. ENG. J. OF MED. 878-881 (April 22, 1971). Dr. Herbst presented a summary of his findings in his testimony during the Nov. 1971 Hearings, *supra* note 20, at 2-9. See also Science Editors, Inc., *Clin-Alert* 188 (Sept. 4, 1971).

53. *Id.*

54. See 14 FOOD CHEM. NEWS 33, 35 (Dec. 25, 1972).

55. *Clin-Alert*, *supra* note 52. Note: The fact that the mothers did not demonstrate any malignant response might suggest that DES does have a "threshold value." Cf. note 36 and accompanying text, *supra*. However, the fact that no cancer was observed in the mother does not necessarily establish that none was present. See note 29, *supra*.



Thus, there are theoretical reasons, as well as animal verification and increasingly suggestive human findings, to indicate that this hormone is specifically carcinogenic to human beings. This conclusion has even been afforded judicial recognition, one court finding as early as 1966 that:

The record shows that DES is definitely a cause of cancer in animals, at least an inciter of incipient cancer in man, and possibly a cause of cancer in man. The record also shows that it may take many years, as much as the greater part of a lifespan, for a carcinogen to produce a detectable cancer, and that the quantity of DES which is required to cause a cancer is presently unknown. All that is positively known is that there is a definite connection between DES and cancer. Furthermore, it was shown that prolonged exposure to even small amounts of carcinogenic substances is more dangerous than short term exposure to the same of even larger quantities.<sup>56</sup>

As was suggested in the *Herbst Report*, by avoiding the treatment of pregnant women with stilbestrol, vaginal adenocarcinoma may be prevented in the future. Of more immediate concern, however, is the possibility of DES residues in meat, especially when consumed by women who are pregnant. Because the fetus is so vulnerable to minute doses of carcinogenic substances, there is no way of judging the extent of the risk created by DES residues which are not detected by the current government assay methods.<sup>57</sup>

## 2. Hormonal Effects of DES

DES may have adverse effects on human health aside from its tendency to produce cancer. Because it is a female sex hormone, its effect is predictably antagonistic to those of masculine hormones. In one study it was found that male birds treated with stilbestrol "...lose many male characteristics; combs, wattles, and reproductive organs shriveled, and their propensities for crowing and fighting disappeared."<sup>58</sup> Similar results were observed in another study using male rats; in adult rats the testes atrophied, and normal development of the testes in immature animals was retarded.<sup>59</sup> Where pregnant rats were adminis-

56. *Bell v. Goddard*, *supra* note 10, at 182.

57. See *Clin-Alert*, *supra* note 52. Note: A given person's susceptibility to carcinogenic substances may be determined by a number of factors. One such factor is age, which helps to explain the extreme vulnerability of fetal tissues. "By and large, the younger the individual exposed, the more susceptible is the tissue to carcinogenic response experimentally." *Nov. 1971 Hearings*, *supra* note 20, at 58. Another possible factor is heredity. "...cancer of the breast among occidental women runs in the family. Mother-daughter cancer of the breast is a very common association." *Id.*

58. LEGIS. REC., *supra* note 19, at 95.

59. Gaarenstroom & Johen, *The Effect of Diethylstilbestrol in the Male Organism*, 9 ACTA REV. NEERLAND 178-181 (1939), as reported in MÉRCK, *supra* note 28.



tered DES, the sexual development of their male offspring was altered in such a way that they acquired female characteristics. They were found to develop nipples and rudimentary vaginae, and their testes failed to descend but remained in the female position at the base of the kidney.<sup>60</sup> In still another study, one hundred chicken eggs were injected with DES on the second day of the brooding period. Of the one hundred eggs, eighty-two produced hens. No roosters were hatched.<sup>61</sup> Also, a previously common failure of male minks to induce pregnancy in females was found to be the result of their being fed chicken heads which contained DES residues.<sup>62</sup>

In humans, stilbestrol has been shown to have similar effects. DES injections given to a seventeen year old girl who had never menstruated, completely lacked breast development, had an enlarged clitoris, and showed a masculine growth of hair, resulted in discernible breast development within a month, menstruation after four months, atrophy of the clitoris, and paling and partial disappearance of the abnormal hair.<sup>63</sup> Similarly, a 27-year-old male with a history of sex crimes was treated with DES to correct a hormonal imbalance causing him to have an abnormally large penis and testes. As a result of the treatment, his penis and testes decreased in size, and there was a corresponding decrease in sexual function.<sup>64</sup> Because of its effect of shrinking the male sex organs, DES has been prescribed by doctors to ease the pain of prostatic cancer by reducing the pressure of the malignancy.<sup>65</sup>

Stilbestrol has also been known to cause breast enlargement in male laboratory workers who were exposed to the hormone.<sup>66</sup> A four-year-old boy, whose mother worked in a pharmaceutical company packaging DES veterinary pellets, developed enlarged breasts with the nipple area showing pigmentation as in pregnancy.<sup>67</sup> His ten-year-old sister began

---

60. R. Green, M. Burrill & A. Ivy, *Experimental Intersexuality: Effects of Estrogens on the Antenatal Sexual Development of the Rat*, 67 AM. J. ANAT. 305-345 (Sept. 1940), as reported in MERCK, *supra* note 28.

61. J. Gaarenstroom, *Geschlechtsbeeinflussung Durch Diathylstilboestrol*, 9 ACTA BREV. NEERLAND 13-14 (1939), as reported in MERCK, *supra* note 28.

62. THE MERCK VETERINARY MANUAL - AND HANDBOOK OF DIAGNOSIS AND THERAPY FOR THE VETERINARIAN (O.H. Siegmund ed. 1967). Cf. WICKENDEN, *supra* note 18, indicating that it was the male mink that was suffering the disability.

63. H. Diser, *Feminization and Demasculinization of a Seventeen Year Old Girl by Injections of Stilbestrol*, 27 ENDOCRINOLOGY 385-386 (Sept. 1940), as reported in MERCK, *supra* note 28.

64. C. Dunn, *Stilbestrol - Induced Gynecomastia in the Male*, 115 J.A.M.A. 2263-2264 (Dec. 28, 1940).

65. LEGIS. REC., *supra* note 19, at 96-96.

66. R. Scarff & C. Smith, *Proliferative and other Lesions of the Male Breast with Bestrol (Estrogen) Workers*, 29 BRIT. J. SURG. 393 (1942), as noted in Prouty, *Gynecomastia with Pigmentation in a Four Year Old Male Following Stilbestrol Exposure*, 9 PEDIATRICS 55, 56 (1952).

67. Prouty, *supra* note 66, at 55.



menstruating, and the mother experienced almost continuous menstrual bleeding.<sup>68</sup> The hormonal activity of DES has even been linked with the manifestation of previously latent leprosy.<sup>69</sup>

The hormonal effects of DES on animals and humans seem clearly established. Under close medical supervision these effects may be desirable.<sup>70</sup> What is undesirable, however, is to expose the general population to such effects due to the presence of DES in the meat they consume. The danger exists because of the practice and inherent difficulties of administering DES to livestock, and the problems in detecting residues of the drug in meat.

## II. THE METHODS OF DES APPLICATION AND THEIR REGULATION

Three basic methods have been employed for the administration of diethylstilbestrol to animals: (1) mixed in the animals' feed; (2) pellet implantation; and (3) combined implantation and feed mixing.

### 1. *Mixing With Feed*

Although the use of DES in cattle feed has been prohibited since January, 1973,<sup>71</sup> it is important to understand the problems involved in DES treated feeds for three reasons: (1) There remains some question as to whether the prohibition is being honored, especially by the small cattle feeders. In fact, it is believed that some feeders might even have stockpiled DES premixes for later use.<sup>72</sup> (2) There is a possibility that legislative amendments will allow the resumption of DES use in feed;<sup>73</sup> and (3) The ruling prohibiting the use of DES in feed is presently being appealed by several drug manufacturers and could conceivably be overturned.<sup>74</sup>

Prior to the ban on DES mixed feeds, livestock producers were allowed to administer to each head of cattle (weighing over 750 pounds)

---

68. *Id.* at 56.

69. W. Symmers, *Sudden Appearance of a Lepromatous Eruption During Prolonged Administration of Stilbestrol in a Case of Unsuspected Leprosy*, 19 INT. J. OF LEPROSY 37 (1951).

70. The question of DES as a drug used in medicine is beyond the scope of this article. For a list of medical uses for which it has been recommended, see Nov. 1971 Hearings, *supra* note 20, at 49-50.

71. See note 12, *supra*.

72. 14 FOOD CHEM. NEWS 13, 15 (Dec. 24, 1972).

73. See text at note 160, *infra*.

74. See text at notes 156-159, *infra*.



a daily dose of 10 mg. of DES in the feed.<sup>75</sup> Usually, however, cattle are not fed on an individual basis. They are typically grouped together in "feed pens" where a number of animals share a common supply of feed. The body weight of the cattle is averaged and, on the assumption that each head will consume two-and-one-half to three percent of its body weight daily, a per capita allotment of feed is computed for each pen. This practice led to problems in controlling the amount of DES ingested by individual animals. While cattle of similar weight within a given feed pen presented little problem, the greater the weight variation among cattle in the same pen the more likely it was that some would consume more than their allotted share.<sup>76</sup>

The accuracy in determining the amount of DES that a particular steer received depended upon the safeguards instituted at a particular feed lot. These safeguards could vary considerably, as might be expected. Moreover, an ingredient added frequently to feed in small quantities will not necessarily possess uniform dispersion characteristics. There was a tendency for a portion of the DES added to remain undispersed in the feed, forming small zones of excessive concentration,<sup>77</sup> so that, again, a particular animal could well have received a disproportionate amount.

The manufacture and use of DES-treated feeds also gives rise to the danger that other feeds might become contaminated.<sup>78</sup> DES is so potent an agent that it is difficult to control even under laboratory conditions. For example, one researcher noted that "...occasionally the presence of estrogen-treated animals in the laboratory leads to accidental contamination of the food supplies of animals in adjacent or nearby cages."<sup>79</sup> Contamination of "non-medicated" feeds has often been discovered where such feeds were prepared in the same machinery previously used to mix DES-treated feeds.<sup>80</sup> It has been argued that careful cleaning of

---

75. *FDA Statement of Position on DIETHYLSTILBESTROL*, Food and Drug Administration, Office of Public Information (January 20, 1971). In 1970 the FDA permitted the users of DES prepared by one particular drug company to administer up to 20 mg. per day in cattle feed. *Id.* See 35 Fed. Reg. 14391 (1970); 21 C.F.R. § 135e.18 (1972). The maximum allowable daily dosage per head of sheep was 3.0 mg. See 21 C.F.R. § 121.241 (b). Note: As of January 1, 1973, all uses of DES in livestock feeds were prohibited. 37 Fed. Reg. 26307 (1972).

76. Personal Interview with cattle feeder, Los Angeles, July 10, 1971.

77. Mahoney & Benson, *Design of Medicated Feed Supplements*, SYMPOSIUM, *supra* note 7, at 74.

78. T. Byerly, SYMPOSIUM, *supra* note 7, at 23.

79. Nov. 1971 Hearings, *supra* note 20, at 68.

80. See 160 AMER. VET. MED. ASSOC. J. 1399 (1972). This problem has been particularly acute where liquid feeds have been used. A common ingredient of liquid feeds is molasses, and because of the nature of this substance, where DES is added to the feed it is often impossible to clean the mixing apparatus sufficiently to prevent the contamination of non-medicated feeds prepared later with the same equipment. In one investigation, "non-medicated" feeds from fourteen liquid feed manufacturers were found to contain low amounts of DES. *Id.* As will be discussed immediately below in the text, the use of non-medicated feeds in cattle was required during the



mixing equipment would eliminate this danger, but such seems unlikely considering the potency of even minute traces of the hormone. Even the use of entirely separate facilities for the preparation of treated and non-treated feeds may not solve the problem of contamination. DES residues have been found in cattle whose "non-medicated" feed had been contaminated by airborne amounts of the hormone which had emanated from a nearby source.<sup>81</sup> In any event, comprehensive governmental inspection and regulation of the animal feed industry is clearly warranted in order to help eliminate the danger of contamination.<sup>82</sup>

Earlier regulations had required that cattle be withdrawn from DES treated feed for a set time period prior to marketing, in order that any residues in the animal be eliminated from its system.<sup>83</sup> The enforcement of these regulations was substantially dependent on the voluntary cooperation of the feed producers and cattle raisers.<sup>84</sup> In extending the 48-hour period (which had been in effect from 1954 to 1971) to seven days, the Commissioner of the FDA acknowledged the impracticality of expecting a cattle feeder, who would probably regard the change-over to non-medicated feeds as a mere nuisance, to have complied with this regulation.<sup>85</sup> Although the Commissioner indicated that the seven-day

---

"withdrawal period" which preceded slaughter. In order that such withdrawal periods be of any effect, it is important that the feed used therein be absolutely free of DES contamination. See *Hearing on S. 2818 (Regulation of Diethylstilbestrol), before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare*, 92nd Cong., 2nd Sess., at 43 (1972) [hereinafter, *July 1972 Hearing*]. See also 37 Fed. Reg. 15748 (points 8, 9, and 10), (1972).

---

81. Nov. 1971 *Hearings*, *supra* note 20, at 70.

82. For a discussion of the problems involved in regulating manufacturers of medicated feeds, see *March 1971 Hearings*, *supra* note 15, at 504-513. Of special importance are the following: The feed industry is the sixteenth largest industry in the United States. There are 8,567 firms registered as manufacturers of medicated feed (no break-down is given as to the number of manufacturers approved for the use of DES). In recent years the FDA has been turning over the responsibility of industry surveillance to the states in a joint state/federal medicated feed program, and decreasing its own active participation. In fiscal year 1968-1969, the FDA withdrew from feedmill inspections in those states which have entered into this program. In 1970 there were 32 such states. *Id.* at 508-509. The program has been unsuccessful, however, and in fiscal year 1968-1969 only 700 out of the total number of registered firms were inspected. In California, for example, there were no inspections made during either fiscal year 1969 or 1970. *Id.* at 507. Furthermore, in 1969 there were fewer than 200 collections for analysis of medicated feed samples, as compared to 2,531 in 1967. *Id.* In 1971, however, the FDA inspected 550 feedmills, while 1,650 inspections were made by the state. *Dec. 1971 Hearings*, *supra* note 15, at 276.

83. See 36 Fed. Reg. 23292 (1971). It had been generally believed that the period for the elimination of DES from most tissues was about 72 hours, or less. Consequently, beef-cattle were not to be fed DES containing feed for 48 hours before slaughter. Based upon a later study which showed that radioactive DES fed to animals left no detectable residues after 132 hours, the FDA determined that all residues were eliminated from the animal in "about" five and one-half days. The required withdrawal period was increased to seven days. *Id.*

84. See *Dec. 1971 Hearings*, *supra* note 15, at 218-219, and Los Angeles Times, pt. I, pg. 26 (Sept. 17, 1970). Problems arose concerning the lack of cooperation from livestock producers. In 1971 the Department of Agriculture withheld from slaughter all cattle from two Texas feed lots when it was discovered that the withdrawal feed used for these cattle contained DES. *Associated Press Bulletin*, Washington, D.C. (Nov. 18, 1971).

85. 36 Fed. Reg. 23292 (1971).



withdrawal period was more likely to be followed,<sup>86</sup> it was ultimately conceded that such controls were not "...reasonably certain to be followed in practice...".<sup>87</sup>

## 2. Pellet Implantation

Implantation involves the insertion of a small "pellet", containing DES (or other active agent), under the skin of the animal to be treated. The pellet is designed to be absorbed into the animal's system over a protracted period of time, thus permitting a continuous application of the drug at a rate slower and more consistent than would occur with feed-mixing or hypodermic injection. Nonetheless, the theoretical and practical aspects of hormone implantation are quite complex, and do present problems in controlling the administration of the drug.

When DES is implanted as a pellet, the rate of release of the active material cannot be completely controlled. It may be released too rapidly initially, and too slowly during the latter part of the absorption period.<sup>88</sup> The rate of pellet absorption is generally related to the surface area of the pellet. With the passage of time, as the surface area decreases, there is a corresponding decrease in the rate of absorption. Pellets containing 12 to 15 mg. of DES are absorbed at the rate of about two milligrams per week for a three to four week period, and more slowly thereafter as the surface area of the pellet decreases.<sup>89</sup>

In addition, the absorption rate may vary between different animals of the same species. Pellets of differing chemical compositions (even though they contain similar concentrations of DES) likewise may have differing absorption rates.<sup>90</sup> Moreover, the use of DES implants in the livestock industry presents several practical problems in insuring that no animal receives too much of the hormone. This is particularly true where DES was administered by both implant and feed-mixes because of the difficulty in calculating the actual amount of the hormone introduced into the animal's system. In addition, it is possible that some cattle raisers use an excessive number of pellets.<sup>91</sup> Of course, the greater

---

86. *Id.* The seven-day period was deemed more likely to be followed because it conformed to the normal "feeding cycle" used in the industry. *Dec. 1971 Hearings*, *supra* note 15, at 219.

87. 37 Fed. Reg. 15748 (1972).

88. Burroughs, Culbertson, Kastelic, Cheng & Hale, *The Effects of Trace Amounts of Diethylstilbestrol in Rations of Fattening Steers*, 120 SCI. 66-67 (1954).

89. REPORT OF THE COMMITTEE ON ANIMAL NUTRITION, *supra* note 16 at 15.

90. *Id.*

91. It is certainly possible that some cattle-raisers will attempt to achieve greater animal weight increases by administering more than the recommended number of DES pellets to each animal. Due to the lack of adequate governmental controls over the cattle industry, there does not appear to be any way to effectively prevent this from happening.

For a general discussion of the use of hormones in livestock, see BUNDY & DIGGINS, *LIVESTOCK AND POULTRY PRODUCTION* at 261-263 (2nd ed. 1961).



the amount of DES introduced into an animal's system, the more likely it will be that residues of the hormone will remain in the edible tissues of the animal when it is slaughtered.

Aside from the possibility of DES residues remaining in the animal, there is also a possibility that traces of the implanted pellet itself might find their way to the meat counter. This possibility obviously presents a significant danger to human health. As a result of the tendency of living tissue to "wall off" foreign bodies, the stilbestrol pellet may not be completely absorbed into the animal's tissues.<sup>92</sup> Moreover, if an animal is marketed prior to the required time for pellet absorption, it is likely that a portion of the pellet will remain in the carcass.<sup>93</sup>

One possible solution to this particular problem might be to require that all pellets be implanted in parts of the animal which would not be sold for human consumption.<sup>94</sup> In the cattle industry, the recommended procedure is to insert DES pellets in the flesh of the animal's ear.<sup>95</sup> The ears are not used for food, although it should be considered that ears are often salvaged for use in soap products. However, the Federal Regulations provide no clear mandate that implantation in cattle be limited to the animals' ears.<sup>96</sup> In fact, meat packers have seriously questioned

---

92. See LEGIS. REC., *supra* note 19, at 96.

93. *Id.*

94. Prior to the banning of DES pellets in poultry, it was required that the pellets be implanted under the skin at the base of the bird's skull. LEGIS. REC., *supra* note 19, at 96. The theory was that any unabsorbed portion of the pellet would be removed with the head at the time of slaughter. However, FDA sampling revealed that sixty percent of the chickens tested contained portions of unabsorbed stilbestrol pellets in the areas of the neck which would be bought by the consumer after the normal severing of the head. *Id.* Chicken necks were not thought to be a popular food item. See WICKENDEN, *supra* note 18, at 117-118.

95. See, e.g., Charles Pfizer & Co., Inc., TECHNICAL INFORMATION BULL. No. 105, July, 1965.

96. Prior to 1969, it was not required that the approval of any application for the use of a drug in meat animals be published in the Federal Register (or the Code of Federal Regulations). Hence, many of the earlier approved uses of DES (many of which were still in effect in early 1973) are not to be found in the Federal Regulations, although uses approved after 1969 are published (see note 128, *infra*). Letter from Daniel W. Clink, Food and Drug Officer, Bureau of Veterinary Medicine, Public Health Service, Food and Drug Admin. (Rockville, Md.), dated April 6, 1973.

The only published regulations concerning DES implants in cattle pertain to its use in conjunction with the male hormone, testosterone. Originally, 21 C.F.R. § 121.241 (Table 2) (1970); deleted in 1971 and replaced with 21 C.F.R. § 135b.6 (36 Fed. Reg. 7648 (1971)). These regulations did require that cattle implants of DES combined with testosterone be administered subcutaneously in the animal's ear. Two months after its inclusion in the Code of Federal Regulations, however, § 135b.6 was amended so as to pertain to "injections" rather than implants, although the requirement that such be made in the animal's ear was retained. 36 Fed. Reg. 12608 (1971). It is important to note that these regulations covered only the administration of DES in combination with testosterone, and did not apply to any previously approved implants of DES *alone* (which, again, do not appear in the Federal Regulations).

See also 21 C.F.R. § 131.21 (1971). This regulation recommends that the following "warning statement" appear on packages of DES implant pellets:

Drugs for Veterinary Use: Recommended Warning and Caution Statements:  
ESTROGEN PELLETS IN CATTLE AND SHEEP.



whether cattle receive only implantations in the ear. Scar tissue found on the hip and loin areas tend to indicate that this is where many implants are actually made.<sup>97</sup>

### 3. Combined Implantation and Feed-Mixing

Although the FDA has never sanctioned the simultaneous use of DES implants and mixed-feeds,<sup>98</sup> interviews with industry personnel indicate that this may have been a common practice.<sup>99</sup> In fact, the FDA acknowledged that no information is available as to number of cattle administered DES solely by way of implant, and that USDA sampling had revealed DES residues in animals which had been treated with both implants and mixed-feed.<sup>100</sup>

## III: THE REGULATION OF DES UNDER THE FEDERAL FOOD, DRUG, AND COSMETIC ACT: A BRIEF LEGISLATIVE HISTORY

As enacted in 1938, the Food, Drug, and Cosmetic Act (hereinafter, "the Act") included two sets of provisions which were pertinent to the regulation of DES as used in the animal industry. The "Food" sections of the Act prohibited the sale or transportation in interstate commerce of any "adulterated" food products.<sup>101</sup> For the purposes of these provisions

---

*Warning*--Implant pellets in the \_\_\_\_ (name of the anatomical area) \_\_\_\_ only. Any other location may result in violation of Federal law. Do not attempt salvage of implanted site for human or animal food.

Note that this warning statement is only *recommended*, and is not required. Note also that the particular anatomical area where the implant is to be made is to be designated by the drug manufacturer (ostensibly in conformance to the conditions stipulated in the manufacturer's new animal drug application). Moreover, it is important to consider that the warning is from the drug manufacturer to the cattle raiser. No similar warning is given to the meat packer, who is usually responsible for discarding the implanted part. See note 99, *infra*.

---

97. Interviews with persons in the Meat Packing Industry, Los Angeles, July 10, 1971. See also *March 1971 Hearings*, *supra* note 15, at 495, where it was reported that regulation at the meat packing level has been largely ineffective due to the time required to analyze meat samples in the laboratory (Statement of Dr. C. Yeutter, Administrator of Consumer and Marketing Service of the U.S. Dept. of Agriculture).

98. FDA FACT SHEET, CSS-D, at 1 and 2 (Dec. 5, 1969). See also, FDA Position on Diethylstilbestrol, *supra* note 75. In a letter dated Oct. 7, 1960, Charles P. Orr, Administrative Officer (Division of Federal-State Relations), Food and Drug Admin., stated: "Feeds containing diethylstilbestrol should not be fed to diethylstilbestrol implanted cattle or sheep." Cf. 21 C.F.R. § 135b.6, permitting the simultaneous use of DES in combination with testosterone in feeds and by means of "injections" in beef cattle (1971).

99. Note 97, *supra*. See also, *March 1971 Hearings*, *supra* note 15, at 491, 494, wherein the FDA took the position that the livestock producer bears the responsibility for the proper use of the drug. The producer should be cognizant of instructions on drug container labels (see note 96, *supra*), and is in the best position to determine if a drug has been administered. In actuality, though, even if DES residues are discovered at the processing level, it is usually difficult, if not impossible, to determine the identity of the culpable producer.

100. 37 Fed. Reg. 15747, 15750 (1972).

101. 52 Stat. 1042, 1044, and 1049 (1938); codified at 21 U.S.C. §§ 331, 334, and 346 (1964).



A food shall be deemed to be adulterated . . . if it bears or contains any poisonous or deleterious substance which may render it injurious to health.<sup>102</sup>

Because it is basically a pharmaceutical product, DES also fell within the scope of the "New Drug" provisions of the Act.<sup>103</sup> Prior to marketing their products, the manufacturers of DES pellets and feed additives were required to submit a "new drug application" to the Food and Drug Administration.<sup>104</sup>

A 'new-drug application' must contain, among other things, reports of animal tests, clinical studies, or other research to show that the drug will be safe under the proposed directions and conditions of use. In the case of veterinary drugs [such as DES implants and feed-mixes], the Food and Drug Administration has interpreted this section to require that evidence be produced to show that no residue of the drug remains in human food products derived from the treated animals. If the evidence is convincing, the application is allowed to 'become effective' and the drug may be marketed. If the evidence of safety is not convincing, the application is denied, and marketing of the drug in interstate commerce is a violation of the law.<sup>105</sup>

While it was known that DES had been shown to induce cancer in test animals, the assay methods used prior to 1957 failed to detect any residues of the drug in the edible portions of treated animals.<sup>106</sup> As a result, DES was deemed to be "safe" for use in meat producing animals, and the first application for its use as an implant in poultry was allowed to "become effective" in 1947.<sup>107</sup>

In 1957, however, a more sensitive and reliable assay method was developed. Using this new procedure, the FDA discovered traces of DES in the liver and skin fat of treated chickens.<sup>108</sup> At that time no residues were detected in DES treated beef cattle. Pursuant to these findings, the FDA considered revoking its approval of DES implants in poultry.<sup>109</sup> In order to revoke a new drug application which had previously become effective, however, the Government was required to show not only that residues of the drug had been detected, but also that, as a

---

102. 52 Stat. 1046 (1938); codified at 21 U.S.C. § 342 (a)(1) (1964).

103. 1960 *Hearings*, *supra* note 2, at 69-70.

104. 52 Stat. 1052 (1938); codified at 21 U.S.C. § 355 (1964).

105. 1960 *Hearings*, *supra* note 2, at 69 (Statement of Arthur S. Flemming, Secretary of Health, Education, and Welfare).

106. *Id.* at 69-70.

107. *Id.* at 69.

108. *Id.* at 70. The following concentrations of DES were detected: liver tissues - 20 to 30 parts per billion, skin fat - 35 to 100 parts per billion. *Id.*

109. *Id.*



result of such residues, the drug was "unsafe" as used.<sup>110</sup> At that time, the Commissioner determined that there was not sufficient evidence to show that the residues found in the treated chickens posed a threat to human health,<sup>111</sup> and no action was taken to revoke these new drug applications until 1961.<sup>112</sup>

An important development took place in 1958 when Congress passed the "Food Additives Amendment" to the Act.<sup>113</sup> Under this Amendment, a party seeking to use a food additive is required to file with the FDA a "petition", which is similar in content to a new drug application.<sup>114</sup> Such petition could be denied "...if a fair evaluation of the data... fails to establish that the proposed use of the food additive, under the conditions of use to be specified in the regulation, will be safe."<sup>115</sup>

Of special importance here is one particular provision added by the Food Additives Amendment, the so-called "anti-cancer clause" or the "Delaney clause," which provides that:

...no additive shall be deemed safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal...<sup>116</sup>

It has been held that the Delaney clause "...is generally intended to prohibit the use of any additives which under any conditions induce cancer in any strain of test animal."<sup>117</sup> It has further been found that this clause

...indicates the magnitude of Congressional concern about the hazards created by carcinogenic chemicals, and places a heavy burden on any administrative officer to explain the basis for his decision

---

110. 21 U.S.C. § 355 (e) (1964). In effect, this provision shifts the burden of proof onto the Government in revocation of suspension proceedings. Rather than the drug manufacturer having to demonstrate that its product is "safe" (see text at note 105, *supra*), the Government is required to establish that the drug is unsafe. See *Bell v. Goddard*, *supra* note 10, at 181, and *1960 Hearings*, *supra* note 2, at 70. In so proving, however, the Government is allowed to use

(2)...new evidence of clinical experience, not contained in such application or not available...until after such application was approved, or tests by methods not deemed reasonably applicable when such application was approved...

21 U.S.C. § 355 (e). This Section has been criticized. See *1960 Hearings*, *supra* note 2, at 72-73.

111. *1960 Hearings*, *supra* note 2, at 70.

112. *Bell v. Goddard*, *supra* note 10, at 179 (court's footnote 4). This case affirmed the Commissioner's final order, issued in December 1961, suspending all new drug applications for DES implants in poultry. *Id.* (court's footnote 5).

113. Pub. L. No. 85-929 (1958); codified at 21 U.S.C. § 348 (1964).

114. 72 Stat. 1785 (1958); codified at 21 U.S.C. § 348 (b) (1964).

115. 21 U.S.C. § 348 (c)(3)(A) (1964).

116. *Id.*

117. *Bell v. Goddard*, *supra* note 10, at 181.



to permit the continued use of a chemical known to produce cancer in experimental animals.<sup>118</sup>

The Delaney clause not only affects the standards applied to test a "food additive petition," but it also has a bearing on the basic prohibition against "adulterated" foods, as mentioned above; "A food shall be deemed to be adulterated...if it is, or it bears or contains, any food additive which is unsafe..."<sup>119</sup> Moreover, the Delaney test of "safeness" was also deemed applicable in determining whether a new drug application should be denied or revoked.<sup>120</sup>

The effect of the Delaney clause on DES depended largely on how the term "food additive" was interpreted. Under the Act, a food additive is defined as including "...any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food..."<sup>121</sup> Animal feeds were deemed to be "foods" within the meaning of the Act, and hence DES, as used in such feeds, was thought to be a "food additive."<sup>122</sup> Under the interpretation it appears that the FDA, by applying the Delaney clause, could have banned the use of DES in cattle feed solely on the ground that the hormone had been shown to be a carcinogen in animal tests, even though no residues of the drug were found in the edible parts of the animals fattened on it.<sup>123</sup> DES implants, however, were not in themselves considered to be food additives, even though such could certainly be said to "[affect] the characteristics of...food."<sup>124</sup> The FDA took the position that hormone implants were not additives to food unless residues of the drug were found to exist in the edible tissues of the treated animal.<sup>125</sup> Thus, the Delaney clause was not deemed applicable to DES implants unless estrogenic residues were actually detected.

---

118. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596 (court's footnote 41) (D.C. Cir. 1971).

119. 21 U.S.C. § 342 (a)(2)(C) (1964).

120. See 1960 *Hearings*, *supra* note 2, at 70-71, and *Bell v. Goddard*, *supra* note 10. While the court in *Bell v. Goddard* seemed to suggest that a new drug application could be revoked on the basis that the drug is unsafe under the Delaney test, it does not appear that its decision was based on that provision. For one thing, the petitioner drug company argued that, since its new drug application had become effective prior to the enactment of the Delaney clause, to apply that provision in this case would constitute "improper retroactive" legislation. *Id.* at 181. The fact that the court never specifically answered this contention seems to indicate that it did not use the Delaney clause to find that the drug was unsafe.

121. 21 U.S.C. § 321 (s) (1964).

122. 1960 *Hearings*, *supra* note 2, at 70.

123. It does not appear that the FDA ever applied the Delaney clause in this way. As is discussed in the text *infra* at notes 126-127, the 1962 amendment to the Act effectively prevented the use of the Delaney clause to prohibit the use of medicated feeds where no residues of the drug were detected in the treated animal. See also 1960 *Hearings*, *supra* note 2, at 73.

124. See note 17, *supra*, and accompanying text to see how DES might be said to affect the characteristics of food.

125. 1960 *Hearings*, *supra* note 2, at 70.



The inconsistent application of the Delaney clause, as between DES implants and feed additives, was equalized in 1962 when the Act was again amended.<sup>126</sup> Unfortunately this was accomplished by creating a "no residues" exception to the Delaney clause for medicated feeds, rather than by applying the clause to DES implants irrespective of residues, as had previously been the case with feed additives. Under this amendment the Delaney clause was made expressly *inapplicable* to drugs used as additives in animal feeds, in the event that the Secretary of Health, Education, and Welfare were to find:

(i) that, under the conditions of use and feeding specified in proposed labeling and reasonably certain to be followed in practice, such additives will not adversely affect the animals for which such feed is intended, and

(ii) that no residue of the additive will be found . . . in any edible portion of such animal after slaughter or in any food yielded or derived from the living animal. . .<sup>127</sup>

The ostensible effect of this was that an application for the use of DES in animal feeds *could* be approved, even though DES had been shown to be a carcinogen, if both of the above criteria were established.

The Act was amended once more in 1968, and a new regulatory category was created: "Animal Drugs."<sup>128</sup> Both DES implants and feed additives fall within the scope of this amendment, although they are actually covered under separate sets of provisions.<sup>129</sup>

126. Pub. L. No. 87-781 (1962).

127. 21 U.S.C. § 348 (3)(a) (1964).

128. Pub. L. No. 90-399 (1968); codified at 21 U.S.C. § 360b (1971). The basic purpose of this amendment was to

. . . consolidate into one place in the law all of the principal provisions of the Federal Food, Drug, and Cosmetic Act which relate to premarketing clearance of new drugs for administration to animals, either directly or in their feed and water.

2 U.S. CODE CONG. & AD. NEWS 2607, 2608 (90th Cong., 2nd Sess., 1968). As has been mentioned above in the text, the regulation of DES as it was used in livestock and poultry was subject to the "Food," "New Drug," and "Food Additives" provisions of the Act. Thus, this amendment served to centralize the regulation of animal drugs. (e.g., this amendment altered the definition of "new drugs" so that it does not apply to animal drugs or animal drugs used in animal feeds. See 21 U.S.C. § 321 (p), as amended by Pub. L. No. 90-399 § 102 (a) and (b) (1968)). The Animal drug and feed manufacturing industry, by the Department of Health, Education, and Welfare, the Bureau of the Budget, and the Department of Agriculture." 2 U.S. CODE CONG. & AD. NEWS, *supra* at 2608.

It should also be noted that, under the 1968 Amendment, all actions taken by the FDA to approve a new animal drug application are to be published in the Federal Register as regulations. 21 U.S.C. § 360b (i) (1971).

129. *Implants* (as "animal drugs"): 21 U.S.C. . . . (1971)

a) Standard of "safety" - § 360b (a)(1).

b) Applications for New Animal Drugs - § 360b (b) & (c).

c) Grounds for refusing application - § 360b (d).

e) Revocation & suspension of applications - § 360b (e)-(h).



Under the 1968 Amendment a "new animal drug" application must be refused if the drug is found to induce cancer when ingested by animal or man, unless it is found that the drug will not adversely affect the animal for which it is intended, *and* that no residues of the drug will be found in any edible portion of the animal after slaughter.<sup>130</sup> The corresponding provisions pertaining to animal feeds do not include a similar requirement. However, no use of a medicated animal feed is to be approved unless the drug additive itself has previously been approved.<sup>131</sup> Thus, no animal feed-mix may be approved unless the drug additive is non-carcinogenic unless it has no adverse effects on the animal, or unless no residues of the drug will be found in the edible tissues of an animal administered the mixed feed.

In considering the regulatory history of DES under the Food, Drug, and Cosmetic Act, it is important to realize that, from the time it was first approved for use in the livestock industry, this drug was known to be a carcinogen. Its approval for use in food animals has therefore turned on whether such uses were deemed to be "safe", and this in turn has usually depended upon whether any residues of the drug were found in the edible portions of the animals treated.

While changes in the law have affected the permissible uses of DES, so too have developments in science and technology. Since the test has been whether any DES residues are found in meat products, the "safety" of DES has usually been determined by the ability of science to effectively detect such residues. This problem is treated in the next section.

---

*Feed Mixes* (as "animal feeds bearing or containing a new animal drug"): 21 U.S.C. ... (1971)

- a) Standard of "safety" - § 360b (a)(2).
- b) Application for Animal Feeds - § 360b (m)(1) & (2).
- c) Grounds for refusing application - § 360b (m)(3).
- d) Revocation & suspension of applications - § 360b (m)(4).

---

130. 21 U.S.C. § 360b (d)(1)(H) (1968).

131. 21 U.S.C. §§ 360b (m)(3)(A) and 360b (i) (1968). Section 360b (m)(3)(A) provides that an application "for uses of an animal feed bearing or containing a new animal drug" may be rejected if there is not then in effect a regulation, published pursuant to § 360b (i), permitting the use of such drug in animal feeds. Section 360b (m) also provides that:

An order under this subsection approving an application with respect to an animal feed bearing or containing a new animal drug shall be effective only while there is in effect a regulation pursuant to subsection (i) . . . , on the basis of which such application . . . was approved, relating to the use of such drug in or on such feed.

Thus, if a new drug application is suspended or revoked (e.g., because it is found to be unsafe as used), any application for the use of that drug in animal feeds will also be of no effect. However, Mr. Peter B. Hutt, Assistant General Counsel for the Department of Health, Education, and Welfare, has taken the position that the basic new animal drug application must be "disapproved in toto, completely, 100 percent" before the use of the drug in animal feeds must also be disapproved. *Aug. 1971 Hearings, supra* note 13; at 409.



## IV. PROBLEMS IN DETECTION, PROOF, AND ENFORCEMENT

In the five-year period from 1965 to 1969, the Department of Agriculture took random samples from slaughterhouses, and in the following percentages of beef tested, found traces of DES: 2.7% in 1965, 1.1% in 1966, 2.6% in 1967, 0.7% in 1968, and 0.6% in 1969.<sup>132</sup> These samples were taken from cattle whose allowed rate of DES ingestion was 10 mg. per day.<sup>133</sup> Although it is arguable that these findings would seem sufficient to take DES feed mixes out of the "no residues" exceptions to the Food, Drug, and Cosmetic Act,<sup>134</sup> the FDA nevertheless allowed a 10 mg. increase in the daily dosage of DES in feed as of September 13, 1970.<sup>135</sup>

In 1971, following earlier reports by the Department of Agriculture that no residues had been discovered in beef, the agency confirmed that residues *had* been found in 10 beef carcasses out of 2,500 samples taken.<sup>136</sup> The incidence of DES residues in the livers of treated, marketed cattle was 0.5% for each year from 1968 to 1970.<sup>137</sup> USDA testing also

---

132. Los Angeles Times, pt. I, pg. 26 (Sept. 17, 1970). This report did not indicate the amount of residues found in edible tissues.

133. *Id.*

134. See text *supra* at notes 125, 127, and 130.

135. See note 75, *supra*. Submitted data indicated that a daily dosage of 50 mg. would leave no residue if a proper withdrawal period (48 hours) were observed. See note 83, *supra*. See also Los Angeles Times, *supra* note 132.

With respect to the FDA's apparent inaction regarding the discovery of DES residues in cattle, Senator Proxmire made this observation:

With a 7-year history of residues, why hasn't the FDA banned DES under the Delaney Clause?

The answer they gave last winter was to insist that there is in theory no reason for there to be residues. The FDA said its experiments persuaded it that DES, used in accordance with the regulations, leaves no residue. Therefore, even though there was no evidence of procedural violations in a number of cases the FDA reported . . . , they argued that if there were residues, there must have been procedural violations.

July 1972 Hearing, *supra* note 80, at 7.

136. *Associated Press Bulletin*, Washington, D.C. (Oct. 12, 1971). The ten positive samples, all of which were taken from the animals' livers, were discovered in April (2), May (1), June (4) and July (3) of 1971. This report followed a U.S. Dept. of Agriculture news release, dated May 27, 1971 (No. USDA 1721-71), which included this statement: "Assistant Secretary Lyng emphasized that no residues have been found in any samples checked for DES in 1971." Note that at least two of the positive samples reported in the *Associated Press Bulletin* were discovered *prior* to the May 27 statement. "The samples were not reported earlier, USDA said, because the responsible laboratory official considered the results to be preliminary until confirmed by a second procedure." *Associated Press Bulletin, supra*. The FDA also reported finding DES residues in four samples of cattle liver during 1971. *Dec. 1971 Hearings, supra* note 15, at 340.

Both the *Associated Press Bulletin* and the USDA news release, *supra*, indicated that the USDA testing program involved the taking of 6,000 samples per year. However, in 1970 alone 35,086,700 head of cattle were slaughtered in the United States. *Livestock Slaughter 1970*, Crop Reporting Board, Statistical Reporting Service, USDA, April, 1971 release. Such a disproportionate ratio casts grave doubts upon the reliability of USDA pronouncements concerning hormonal food additives. The statistical validity of USDA testing has been seriously questioned. See letter from Stern Community Law Firm (1971), as noted in *March 1971 Hearings, supra* note 15, at 514.

137. *Nov. 1971 Hearings, supra* note 20, at 93. The concentration of DES detected in cattle livers has been reported to be as high as 36 parts per billion. *Dec. 1971 Hearings, supra* note 15, at 226. *Cf. Aug. 1972 Hearings, supra* note 13, at 393, where it was stated that concentrations of up to only 9 parts per billion had been detected.



confirmed residues in steers seven days after they had received a single oral dose of 10 mg. of DES.<sup>138</sup>

The new drug applications for the use of DES in the manufacture of animal feed for cattle and sheep were finally withdrawn, in part, on August 4, 1972.<sup>139</sup> (DES used for feed which had already been manufactured was not immediately affected by this order. Its use was ordered discontinued as of January 1, 1973.<sup>140</sup>) The Commissioner, however, determined that it was premature to rule on the objections and requests for a hearing with respect to DES implants, on the basis that: (1) The new studies did not include implants;<sup>141</sup> (2) earlier testing of implanted animals had not shown detectable residues; and (3) smaller dosage levels were involved with implants. Although interim data indicated that DES residues were present from 30 to 60 days after pellet implantation, the FDA concluded that this was not a sufficient basis to withdraw its approval of DES pellets which were marketed under labeling which called for slaughter no sooner than 120 days after implantation.<sup>142</sup>

Perhaps much of the problem in determining whether certain uses of DES should be disallowed, on the basis of residues found or not found in animal tissues, has resulted from variations and inherent limitations in the methods of testing used.<sup>143</sup> Many of the claims that estrogenic residues were not found in test animals were based on a method of testing having a sensitivity range of 1 microgram per 1.1 pound.<sup>144</sup> If DES were removed from the animal's feed from between 48 and 72 hours before the animal was killed, the amount of residue was reduced to such low levels that often it could not be detected by this method.<sup>145</sup> With respect to DES implants, the FDA has acknowledged the difficulty in effectively testing the low residue levels involved where the animal was killed 120 days after implantation.<sup>146</sup>

Because of this limited range of sensitivity in testing, a pound of meat certified as being free of DES residues could nonetheless contain undetected traces of the hormone. This is significant because the actual scope of danger presented by low levels of DES, especially if a long

138. 37 Fed. Reg. 15747, 15749. See also 37 Fed. Reg. 26307 (1972).

139. 37 Fed. Reg. 15747 (1972).

140. *Id.* at 15749.

141. *Id.* at 15750.

142. See 14 FOOD CHEM. NEWS 33, 35 (Dec. 25, 1972). Pending the outcome of further testing, the FDA has proposed the requiring of a 120 day withdrawal period for DES implants. Two drug manufacturers were told by letter to stop recommending (in the instruction labels to their products) withdrawal periods of only 21 and 70 days. *Id.*

143. See B. Vos, *Tissue Residues of Drugs from the Use of Medicated Feeds*, SYMPOSIUM, *supra* note 7, at 115, 116.

144. *Id.* at 167-169. One microgram (one millionth of a gram) per 1.1 pounds is the equivalent of 0.9 parts per billion. See note 149, *infra*.

145. See Dec. 1971 Hearings, *supra* note 15, at 218-219.

146. 14 FOOD CHEM. NEWS 33 (Dec. 25, 1972).



range exposure is involved, is presently unknown. Moreover, it has been established that minute amounts of DES can in fact cause cancer, at least in test animals.<sup>147</sup> Consequently, the claim that no appreciable quantities of estrogenic residue could be demonstrated in cattle fed DES may well have been misleading.<sup>148</sup>

The fact that in recent years there has been an increase in the number of instances where DES residues have been detected might be attributed in part to the development of better methods of testing (rather than an actual increase in residues).<sup>149</sup> The latest method to be employed is a chemical technique known as the "GLC (gas-liquid chromatography) Method", which has detected DES residues in a higher percentage of samples taken than had previous methods.<sup>150</sup> There is some skepticism, though, as to the reliability of this new technique,<sup>151</sup> and the FDA has not as yet officially approved its use.<sup>152</sup>

Irrespective of the particular assay methods used, however, the fact remains that DES residues *have* been found in beef-cattle,<sup>153</sup> and this alone is significant in light of the potential health hazards presented by the existence of these residues. After reviewing the various methods

---

147. See *Dec. 1971 Hearings*, *supra* note 15, at 226.

148. See J. Kastelic, RESIDUES PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON FOOD PRODUCTION, CHEMICAL AND BIOLOGICAL HAZARDS IN FOOD at 136-137 (C. Ayres, A. Kraft, H. Snyder, H. Walker eds. 1962).

149. At least some proponents of DES have taken this position. See 37 Fed. Reg. 12251 (1972) in which the FDA intimated that a recent increase in reported residues was attributable to the employment of a new testing method. This particular controversy arose in 1971 when residues in cattle were detected using a new chemical assay technique (see text at note 150, *infra*), whereas the previously used biological assay method had not produced such results. This argument seems to break down, however, when one considers that the difference in sensitivity between the two methods does not appear to be significant. The biological method is considered to be "... sensitive at all times to 2 [parts per billion] and occasionally, to a half a part per billion..." (*Dec. 1971 Hearings*, *supra* note 15, at 175). The chemical method is said to have a sensitivity of from one to two parts per billion (*Nov. 1971 Hearings*, *supra* note 20, at 54; *Dec. 1971 Hearings*, *supra* note 15, at 126, 132, and 317-320). Note: "Superior insensitivity" (of chemical method) was interpreted to mean that its relative speed and convenience in regulatory program make it "superior" to biological assay method. *Id.* at 318. See also *July 1972 Hearing*, *supra* note 80, at 7.

150. See *Dec. 1971 Hearings*, *supra* note 15, at 320-322, and *July 1972 Hearing*, *supra* note 80, at 7.

151. *Dec. 1971 Hearings*, *supra* note 15, at 317-321.

152. *Id.* at 341.

153. For the purposes of the Food, Drug, and Cosmetic Act, it may be important to consider whether these residues were found in an *edible portion* of the animal. See text at notes 117, 126 and 130, *supra*. Note that the original approval of the use of DES implants in poultry was premised on the condition that all pellets be implanted in the head or neck region of the bird, which parts were not deemed to be "edible". See note 94, *supra*. Various investigations have shown that, if DES residues are present, they are usually found to a greater extent in the kidneys and livers of the treated animals, rather than in the fat or muscle tissues. See Kastelic, *supra* note 148, at 136-137. See also note 138, *supra*. Although the most popular cuts of beef are probably those taken from the muscle tissues, it is clear that the liver and kidneys are also "edible" parts of the animal. In fact, the FDA has considered (and rejected) the possibility of requiring that these organs, when taken from an animal treated with DES, be destroyed (in order that the rest of the animal could be marketed). See 37 Fed. Reg. 15749 (1972).



used to detect DES residues in beef, the American Medical Association Council on Foods and Nutrition adopted a report which states in part:

[T]race amounts of estrogen activity may sometimes be found by sensitive assay methods in meat from beef cattle... treated with the usual levels of compounds having estrogenic activity. Since such compounds are not destroyed by cooking, it is possible that a person eating large amounts of liver, kidney, or other organs from animals treated with estrogen could consume up to several micrograms of compounds with estrogenic activity per day. However, based on the average daily consumption of meat, less than 1 [microgram] of compounds with estrogenic activity would be consumed.<sup>154</sup>

The inherent dangers arising from the consumption of even these small quantities of DES, especially if on a continual basis over a long period of time, have been demonstrated above. It is therefore of great importance that no meat products be allowed to reach the consumer which contain *any* residues of DES, no matter how minute.

## CONCLUSION

Diethylstilbestrol has been found to constitute so serious a hazard to human health that at least 21 other nations have completely banned its use as a growth-stimulant in meat animals.<sup>155</sup> The future of DES in the United States is presently unclear. At the time of this writing, three drug manufacturers have appealed the FDA ruling which (as of January 1, 1973) prohibited the use of DES treated animal feeds.<sup>156</sup> Among other things, these companies have alleged that the residue being found in animal tissues is not DES, but is a chemically different metabolite of stilbestrol, known as diethylstilbestrol-monoglucuronide. They argue that, because this compound is not really DES, its presence in the animal tissues is not a "residue" within the meaning of the Food, Drug, and Cosmetic Act.<sup>157</sup> The appellants also argue that they have been denied the due process of law, resulting from the FDA's rejection of their request for a hearing.<sup>158</sup> If this argument is successful, it could force the FDA to conduct a protracted public hearing. Pending the outcome of such hearing, the reviewing court could still conceivably avoid the order and reinstate the DES new drug applications.<sup>159</sup>

---

154. Briggs, *Estrogen Residues in Meat: Public Health Aspects*, 164 J.A.M.A. 1473, 1475 (1957). The conclusions drawn by Briggs differ from those reached by this writer.

155. *March 1971 Hearings*, *supra* note 15, at 514.

156. 14 FOOD CHEM. NEWS 2 (Sept. 18, 1972). Case initiated in the District of Columbia Court of Appeals on Sept. 15, 1972. *Id.*

157. 14 FOOD CHEM. NEWS 33 (Sept. 25, 1972). It is argued that "residues" within the meaning of the law must be the original substance, biologically unchanged.

158. 14 FOOD CHEM. NEWS 32 (Nov. 20, 1972).

159. *See id.*



The possibility of future legislation withdrawing the present restrictions on the use of DES should also be considered. Congressional hearings have been scheduled to review the impact of the Delaney Clause, and it is likely that substantial lobbying will be used in an effort to have the "no residues" test reduced to one of "no effect levels."<sup>160</sup> In view of the current controversy over rising meat prices, it is likely that arguments for extending the uses of DES will be seriously considered.

Mention should also be made of the fact that the Food, Drug, and Cosmetic Act does not pre-empt similar state regulation, unless the state law is in direct and positive conflict with the Federal provisions.<sup>161</sup> Thus, the states might well consider the possibility of enacting laws to supplement the Federal regulations.

The problem of diethylstilbestrol does not lend itself to an easy solution. The economic benefits obtained through the use of this drug appear, at least to some, to be a compelling reason in favor of its continued use. This argument must be viewed, however, against the evidence which shows DES to be a major threat to the public health. Perhaps, again to some, this evidence is not sufficiently compelling. Yet, when dealing with matters of health there can be no allowances for speculation or compromise. In the words of former Secretary of Health, Education, and Welfare, Arthur S. Flemming:

Unless and until there is a sound scientific basis for the establishment of tolerance for carcinogens, I believe the government has a duty to make clear -- in law as well as in administration -- that it will do everything possible to put persons in a position where they will not unnecessarily be adding residues of carcinogens to their diet.

The population is inadvertently exposed to certain carcinogens. Ultra-violet light occurs in sunlight. The burning of most fuel produces some minute quantities of chemical compounds that elicit cancer in experimental animals... In view of these facts it becomes all the more imperative to protect the public from deliberate introduction of additional carcinogenic materials into the human environment...

It is clear that if we include in our diet substances that induce cancer when included in the diet of test animals, we are taking a risk. In the light of the rising number of cases of cancer, why should we take that risk? Why shouldn't the government do everything

---

160. 14 FOOD CHEM. NEWS 33 (Dec. 25, 1972).

161. See *Royal Baking Powder Co. v. Emerson*, 270 F. 429 (8th Cir. 1920), which held that where a state law is not in conflict with the National Food and Drug Act, a broad latitude is allowed states in protecting their citizens from adulterated or misbranded articles.



possible to see to it that we do not involuntarily take that risk? The purpose of our Food and Drug laws, as Justice Frankfurter put it, is to touch 'phases of the lives and health of people which, in the circumstances of modern industrialism are largely beyond self-protection.' And, as Judge Hastie put it, the government may reasonably decide to take action which will not subject the public to even 'slight risks'.<sup>162</sup>

---

162. 1960 Hearings, *supra* note 2, at 61-70.



## APPENDIX

*The following article by Daniel Zwerdling appeared in the Los Angeles Times, May 20, 1973, and is reprinted here with the author's permission. Mr. Zwerdling is a former staff writer for The New Republic and is now a free-lance writer and researcher in Washington, D.C. The article discusses the prospective use of new and potentially harmful drugs in the cattle industry, to serve as replacements for the now banned Diethethylstilbestrol.*

The Food and Drug Administration finally banned DES, the cancer-causing growth hormone, from the nation's farms last month, but cattle feeders needn't fret. They've already started buying other FDA-approved hormone fatteners to take its place.

It is the consumer who still has reason to worry—because these other hormones, like DES, are also considered cancer-causing agents, or carcinogens, at least in laboratory animals.

In fact, our beef, hogs, sheep and poultry digest daily doses of at least 16 other drugs which the FDA knows or suspects are cancer-causing. Federal meat and poultry inspectors at the Department of Agriculture cannot say whether we are or are not eating residues of the potent drugs, because they have never tested for them. They can't.

For most of the drugs, says Harry Mussman, the department's deputy director for scientific and technical services, "we just don't have the technology."

Some of the risks to ponder:

—The cattle industry expects the major replacement for DES to be Synovex, a compound of the estrogen estradiol benzoate and progesterone. "All estrogens are considered to be carcinogens," according to an FDA memo, "since all estrogens that have been adequately tested have been shown to be carcinogens in animals." The FDA also considers progesterone, which metabolizes to estrogen in the body, a "potential" carcinogen.

"Whatever dangers you want to attribute to DES," says Dr. Mortimer Lipsett at the National Institutes of Health, "you can attribute to Synovex."

—Heifers, which accounted for 35% of our beef last year, have been munching feed laced with MGA since 1968. The FDA has been debating for more than two years now whether MGA (melengestrol acetate) causes cancer—as animal studies by the Upjohn Co., its manufacturer, suggest may be the case. Meanwhile, sales of the synthetic hormone are increasing.

—Poultry farmers inject their chickens with estradiol monopalmitate, another estrogen, which makes them grow fatter faster on less feed—and which FDA considers, like "all estrogens," cancer-causing. Until very recently, the FDA also permitted farmers to inject dienestrol diacetate, which scientists linked along with DES, to rare vaginal cancer in young women. And Thanksgiving turkeys might have eaten dimetridazole or ipronidazole; they aren't hormones but they do induce cancer.

—FDA files hold disturbing evidence suggesting that the popular nitrofurran and sulfa compounds—used on chicken and hog farms across the country



to promote growth and prevent disease—may be candidates for the cancer roster, too.

Plowing through FDA reports on these drugs and interviewing a dozen top FDA and Agriculture Department officials gives one a troubling sense of *deja vu*. The files on the drugs—the scientific warnings, the test procedures and the sometimes startling rationales the FDA uses to justify their use—could well be the DES story all over again.

Consider Synovex. Since Syntex Laboratories, the maker of birth control pills, brought this cattle fattener on the market in 1956, it's played a poor second to DES. DES is a synthetic estrogen and easy to produce; Synovex, a natural compound, is harder to manufacture and consequently costs nine times as much. DES thus captured about 95% of the market.

But "now that DES is off the market," says company spokesman Bill Spencer, Syntex expects that Synovex "will be fine." Full-page ads have hit the farm journals, trying to persuade cattle feeders that "1973 could be the year you surpass your DES gains with Synovex"; they claim that a Synovex implant can put 37 pounds more on the animals than DES ever could.

"The biggest majority of them (cattle feeders) will probably use Synovex" or another cattle fattener called Ralgro, predicts Duane Flack, vice president of the mammoth Montfort Feedlots in Greeley, Colo. James Herrick, the USDA's top veterinarian in Iowa, estimates that "already 35% to 50% of cattle feeders across the country" who once used DES have switched to Synovex or Ralgro.

Few scientists doubt that estradiol benzoate, the chief ingredient in Synovex, induces cancer. "There are literally thousands of studies—well, maybe hundreds—which show estrogens are carcinogenic," says Richard Lehman, director of nutritional sciences in the FDA's bureau of veterinary medicine.

Under federal law, the FDA must ban any drug which causes cancer in animals or humans except if "no residue of the additive will be found" in the meat by test methods "prescribed and approved" by the FDA. Why does the FDA ban DES but bless Synovex? The government inspectors kept finding residues of DES, Lehman explains, but "we have no data that show we alter the amount of estrogen that naturally occurs in the meat" after a Synovex implant.

But the USDA has never inspected the meat we eat for Synovex residues. And even now that the drug is coming to the farms in a big way, "we aren't doing any testing and will not be doing any testing for Synovex," says Mussman at the USDA.

If you ask FDA officials where they get their safety data, they'll refer you to some bioassay tests which Syntex made about 18 years ago under controlled laboratory conditions, not on a farm. These cumbersome and time-consuming tests, which Mussman says "just don't work for a regulatory testing program," can't measure residues below 2 parts per billion (ppb). Theoretically, there could be 1.9 ppb in the meat and the test wouldn't show it.

The FDA used the same kind of test when DES was around. Quoting "voluminous" data from the test results, the FDA's director of veterinary medicine, C.D. Van Houweling, assured a House of Representatives subcommittee in March, 1971, that "no residue (of DES) would be left" when farmers follow directions.



But about six months ago scientists developed a far more sensitive experimental radioactive tracing technique, which found around 42 parts per *trillion* in meat of DES long after there should have been none. Reluctantly, the FDA banned the hormone from the animal market. The test methods available, it said, are "not sufficiently sensitive" to assure consumers they're not eating DES residues in their meat.

With this history in mind, it is difficult for FDA and USDA officials to explain how they can guarantee safe use of Synovex, using the same method that can't protect us from DES. Looking for Synovex residues in meat, in fact, will be far more difficult because its estrogen—unlike synthetic DES—already exists naturally in animals.

"So far," says Lehman, "we don't even know what the amounts occurring *naturally* are in the meat. The FDA asked Syntex last September to perfect the new parts-per-trillion method and to start figuring out how to set up a workable testing program. In a year and a half (the deadline) says Van Houweling, "we'll know a lot more."

Mussman, when asked if he could assure the public that there is no Synovex residue in the meat, answered simply, "No, we cannot."

Whatever the FDA tells you—or can't tell you—about Synovex holds true for the other cancer-causing hormones on the farms, too. Farmers inject 10-milligram pellets of estradiol monopalmitate, from the Mattox & Moore Co., in chicken necks; but again, it's a naturally occurring estrogen and the USDA has no way to measure the residue.

"It's being used very little in relation to the total amount of chicken being produced," says Mussman. Just how much is being used, however, is the FDA's and the company's "trade secret."

While consumers wait for the companies to figure out a way to detect known carcinogens in the meat, FDA scientists are mulling over studies which suggest that other widely used drugs—also undetectable—may induce cancer.

For example, Van Houweling reported in 1968 that "one of our scientists has concluded that furazolidone . . . is tumorigenic and carcinogenic" — a distressing bit of news, since farmers across the country have been feeding furazolidone and over 40 other nitrofurans compounds to hogs and chickens for several decades.

The FDA proposed banning four nitrofurans drugs on March 31, 1971—and since then it has continually postponed a final decision while the Norwich Pharmacal Co., the manufacturer, bumbles its carcinogenicity tests (at the crucial stage in one round of tests, some heat mechanism went haywire and researchers cooked all the test animals). Results are expected around next October. Residue data: "We haven't tested for them, either," says Mussman.

Or take the sulfa drugs, commonly mixed with low-level antibiotics in the feed of cattle, hogs and poultry. The FDA received test results "two or three years ago," according to veterinary assistant director Fred Kingma, which show that these mixtures sometimes produce thyroid tumors—"a goiter effect," Kingma says, "which could be easily removed surgically."

Follow-up tests: The FDA has "alerted" manufacturers that it "may ask" them to start new studies sometime this month. Residue data: surveys of 6,000 random beef carcasses by FDA consultant William Huber of the University of



Illinois found that "one out of every four pieces of meat you consume contains antibiotics"—usually a compound of antibiotics and sulfamethazine.

Perhaps two of every five pieces of meat you eat this year will come from heifers, according to USDA, many of them fattened on MGA, the "female DES." MGA suppresses estrus—kills their sex drive. "When females are in heat they're continually jumping around," says FDA veterinarian Robert Gill-espie. "It keeps a turmoil going in the fattening lot, and the animals don't eat as well as they should. With MGA, they'll pay a little more attention to the feed bunk."

FDA scientists have considered MGA a "potential" carcinogen since Upjohn brought it on the market, since it's a synthetic progesterone. Upjohn studies over two years ago showed that MGA induces a high rate of cancer in one cancer-prone strain of mice, and the FDA has been interpreting the results ever since. The National Cancer Institute reviewed the studies, and although it won't conclude that MGA does induce cancer, it urged last month that the FDA conduct more tests.

Even if FDA gives MGA its seal of approval (and if it does, scientists on its own staff are likely to protest) the drug poses other safety problems. Upjohn followed its mouse studies with dog tests "to prove the product is safe," says one FDA official, "but it didn't quite work out that way." At high doses, MGA disrupted the dogs' reproductive cycles and damaged the uterus.

"I'm worried," this official said, "that trace residues of the hormone (in the meat) could disrupt a woman's menstrual cycle." Richard Lehman, in the FDA's veterinary drug bureau, was asked if the findings worry him. "Quite honestly," he said, "the reason you put MGA in cattle in the first place is to suppress the reproductive process. So if it interferes with a dog's reproductive system, that's what it's supposed to do. Dogs, cattle, humans—it does the same thing if you get enough there."

"If you monkey around with the natural balance of hormones, something's going to happen," Lehman said. "You don't have to be a scientist to figure that out." Now, Van Houweling added in a separate conversation, "the question is whether the amounts in beef are harmful to people. It will be a little while yet before we reach our conclusions."

The answer becomes more urgent as time goes by because cattle feeders are increasing the proportion of heifers in the feedlots and increasing the use of MGA now that DES is gone. USDA officials assured the Congress two years ago that they had a workable method sensitive to 25 ppb, but now Mussman concedes that the USDA never used it. "It just hasn't worked well in our hands," he says.

Upjohn's own experimental data, according to one FDA veterinary official, indicate that consumers are eating "a few parts per billion" in the fat marbled throughout their meat.

The DES debacle, which dragged several years through FDA deliberations, congressional hearings and the federal courts, came to a close little more than a month ago. But already the lessons it should have taught the FDA about trying to control cancer-causing drugs on the farms ("really a foolhardy undertaking," a former National Cancer Institute scientist warned a congressional subcommittee) seem to be lost.



When the FDA insisted that DES residues wouldn't end up in the meat, for example, it meant that tests showed that there would be no residues of the drug according to directions "reasonably certain to be followed in practice." As DES violation files in the FDA's own compliance section show, however, farmers didn't always obey the label.

Even if the USDA were to test every piece of meat in the market for these carcinogenic drugs—now, of course, it doesn't test even one—and to report that it found "no residues," it would mean only that it found no residues at the sensitivity level of its tests. "Now, this means that there *will* be a residue of carcinogens in the meat," FDA assistant general counsel Peter Barton Hutt emphasized recently before the Senate Commerce Committee. "We know that . . . The point is to keep it low enough so that it cannot be detected by current methods."

"Current methods" in 1962 defined 50 ppb as practically zero; this year, the FDA concludes that 2 ppb "is not sufficiently sensitive." How sensitive is sensitive enough? Cancer researchers have never been able to determine a safe level for a carcinogen, a quantity so small that it may not cause cancer in some persons.

Just three weeks ago the FDA banned the chicken growth hormone dienes-trol diacetate. No, federal inspectors didn't report any residues in the meat (they never inspected for them), but, Van Houweling reports, "it would take a year or longer of intensive investigation" before the manufacturer could develop "a more sensitive test." In his opinion that's "too long."

It's a bewildering show of force: The agency has given the makers of Synovex, for just one example, at least another year and a half for the same purpose. Even as it banishes one carcinogen from the farms, the FDA brings on another—like Pfizer Laboratories' Carbodox, a new wonder drug for hogs, which Pfizer tests show causes cancer in animals. It's been on the market about four months, and already "they've been spending more money advertising that drug than any drug I've ever seen," says a USDA official.

"Of the 330,000 cancer deaths a year in this country," estimates cancer expert Samuel Epstein, "somewhere in the region of 60% to 80% of them are environmental in origin." Some FDA critics like Dr. Roy Hertz are asking: When the human body already can develop cancer on its own, "what sense does it make to add an additional load at will?"

Van Houweling, on the other hand, conceives a grand portrait of a greatly polluted world and paints cancer-causing drugs on the farms as just a tiny dab. "There are many possible carcinogenic substances in the environment that people can't escape," he said. "Why, even sunlight is definitely hazardous if you stay in it too long."



## COMMENT

## USURY LAWS:

*Illusory Protection for the Necessitous Borrower*

*"Law grind the poor, and rich men rule the law."*<sup>1</sup>

Through the ages, man has often found it necessary to borrow to meet expenses beyond those normally budgeted for under his regular income. To meet this need, lending and charging for such service developed as a business. Obviously, as the demand for this service increased, the price for use of the borrowed funds (i.e. the interest rates on the loans) did likewise. When these interest rates, as set by trade custom, became "usurious"<sup>2</sup> they were subjected to governmental regulation.

Usury has been a prohibited practice in civilized nations since the Babylonian period.<sup>3</sup> Many sections of the Bible,<sup>4</sup> have condemned usurious practices, saying, "...take thou no usury of him or his, but fear thy God."<sup>5</sup> Presently, all 50 states have usury laws on their books intended to protect borrowers.<sup>6</sup> However, as will be shown, these laws are usually ineffectual insulation for the class of borrower<sup>7</sup> which is most in need of protection.

*The Necessitous Borrower*

One who is subject to the pressures of indigency or oppressed by poverty, and who borrows money to alleviate it, is a necessitous borrower.<sup>8</sup> Such an individual will take out a small loan primarily to consolidate or re-finance existing obligations (e.g. taxes, medical expenses, utility bills, etc.), or to purchase durable goods (e.g. automobiles, household appliances, etc.).<sup>9</sup>

1. Oliver Goldsmith, *The Traveller*, line 386.

2. Usury was defined as the taking of exorbitant interest (i.e. 40 percent) under English Common Law, and was punishable as a misdemeanor. 55 AM. JUR. *Usury* § 172 (1946).

3. The King had the power to regulate interest rates. CODE OF HAMMURABI § 51 [2 G.R. DRIVER & JOHN C. MILES, *THE BABYLONIAN LAWS* 29 (1955)].

4. *Deuteronomy* 23: 19, 20, *Ezekiel* 18: 5, 13.

5. *Leviticus* 25: 35, 36, 37.

6. See appendix, for a state-by-state breakdown of statutes and interest rates.

7. J. CARLIN, J. HOWARD, S. MESSINGER, *CIVIL JUSTICE AND THE POOR* 8 (1967).

8. BLACK'S LAW DICTIONARY 1182 (4th ed. 1951).

9. S. BOOTH, *FINANCE FACTS YEARBOOK* 57 (1970). Note: With respect to the purchase of durable goods, the consumer may also "borrow" the purchase price by buying the desired item "on time." The installment sales contract is in effect, a loan of the purchase price of a retail item extended to the buyer by his vendor. Such an extension of credit also involves a "finance charge" rather than "interest", and the maximum rates chargeable may also be regulated by state law. For example see the Unruh Act of California, [CAL. CIV. CODE § 1801 *et. seq.* (West 1973)].



Statistically it is assumed that such a borrower earns less than \$6,000 annually,<sup>10</sup> and is generally unable to obtain a loan in excess of \$1,000, due to lack of adequate collateral.<sup>11</sup> Besides limiting the amount of his loan, the necessitous borrower's lack of collateral also limits his choice of lenders.<sup>12</sup> Since large lending institutions (i.e. banks, and savings and loan companies) are disinclined to take credit risks by extending small unsecured personal loans of the type this borrower requires, he is forced to deal with the small finance companies which will do so. As will later be illustrated, such lenders are often immune from the operation of usury laws and may therefore impose higher ("maximum") interest rates. Thus the necessitous borrower must pay the exceedingly high rates which they ask for their services, since he cannot readily obtain these services from other lending institutions.

The pool of necessitous borrowers, in fact, provides a major portion of the business of small loan companies. It has been assumed that a necessitous borrower characteristically receives less than \$6,000 per year. Nationally, approximately 26 percent of all families have annual incomes of less than \$6,000.<sup>13</sup> In California, about 20 percent of all families are in this income bracket.<sup>14</sup> Over 70 percent of the unrelated individuals in both California, and in the entire country are below the \$6,000 annual income level.<sup>15</sup> And, nationwide, approximately 40 percent of all loans are taken out by those with less than \$6,000 annual income.<sup>16</sup>

Secondly, it has been assumed that a necessitous borrower is limited to loans of less than \$1,000 due to his lack of collateral. National figures show that the average amount for a small personal loan is approximately \$696.<sup>17</sup> In 1970, of the California finance company loans under \$5,000, approximately 34 percent were for \$500 or less,<sup>18</sup> and 66 percent of such loans were for less than \$1,000.<sup>19</sup> Maximum interest rates were charged

---

10. According to the finance industry, approximately 40 percent of the borrowers of finance companies have annual incomes less than \$6,000. BOOTH, *supra* note 9, at 58.

11. Also, the finance industry has stated that the average size personal loan for 1968 was \$696. BOOTH, *supra* note 9, at 63. The current trend of rising prices generally will shift the size of the average loan upward accordingly.

12. Comment, *Accounts Receivable Financing and the California Personal Property Brokers Act*, 14 STAN. L. REV. 520, 526 (1962).

13. U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 316 (1971).

14. U.S. DEPT. OF COMMERCE, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS-CALIFORNIA 384 (1971).

15. See notes 13 & 14, *supra*.

16. See note 10, *supra*.

17. See note 11, *supra*.

18. 1970 CAL. DEPT. OF CORP. ANN. REP., Operations of Licensed Finance Companies, exhibit D.

19. 1970 CAL. DEPT. OF CORP. ANN. REP., Operations of Licensed Finance Companies, exhibit C.



on over 90 percent of the loans in this category (i.e. loans of under \$5,000).<sup>20</sup>

Hence, it can be seen that the majority of small personal loans, both in California and nationwide, do not exceed \$1,000. It is logical to assume, then, that the majority of these loans are granted to low income/necessitous borrowers, who do not have enough collateral to support larger loans. Since maximum interest rates are being charged on a great majority of such small loans, the necessitous borrower is, therefore, the one most oppressed by the lack of effective regulation of these rates.

Structurally, state laws usually do not fulfill their purpose of protecting the necessitous borrower; and, federal regulations (i.e. Truth-In-Lending laws) require only full disclosure of terms and charges for loans, but are silent upon the interest rates permitted.<sup>21</sup>

#### *Effect of Interest Rates in Selected Jurisdictions*

The following table illustrates the vast discrepancies between allowable interest rates on small loans and those rates statutorily designated as usurious, in a group of states selected either for extremely high or low interest rates, or as otherwise notable jurisdictions (i.e. New York and California). For purposes of this comparison, the amount of the loan will be \$500. All interest rates will be expressed in annual percentages.

TABLE

STATE	RATE ON \$500	MAX. RATE	USURY
ALASKA <sup>22</sup>	33.6%	36.0%	8%
ARKANSAS <sup>23</sup>	10.0%	10.0%	10%

20. *Id.*

21. 82 Stat. 146, 15 U.S.C. § 1601 *et. seq.* (1968).

22. Max Rate; ALA. STAT. Title 6, ch. 20, § 06.20.230 (Supp. 1971). Usury; ALA. STAT. Title 45, ch. 45, § 45.45.010 (Supp. 1971). *Note:* The usual practice of the Finance Industry is to fix the maximum allowable interest rate to *each incremental portion* of a loan. For instance, in Alaska the annual rate of interest on a loan of \$500 is computed in the following manner:

- 1) The first \$400 bears a maximum interest rate of 36%.
- 2) The additional \$100 bears a maximum interest rate of 24%.
- 3) The actual interest rate on the total amount of the loan may be found by first multiplying each incremental portion by the applicable interest rates, adding the resulting figures, and dividing this total by the amount of the loan.

$$\begin{array}{r}
 \$400 \times 36 = \$14,400 \\
 \$100 \times 24 = \$2,400 + \\
 \hline
 \$16,800
 \end{array}$$

$$\$16,800 \div \$500 = 33.6$$

This same method is used to arrive at the annual rates of interest on \$500 in each of the examples set out in the text.

23. Max. Rate; ARK. STAT. ANN. Const. art. 19, § 13 (1947). Usury; ARK. STAT. ANN. Const. art. 19, § 13 (1947).



TABLE (CONT.)

STATE	RATE ON \$500	MAX. RATE	USURY
CALIFORNIA <sup>24</sup>	26.4%	30.0%	10%
COLORADO <sup>25</sup>	28.8%	36.0%	6%
GEORGIA <sup>26</sup>	16.0%	16.0%	6%
HAWAII <sup>27</sup>	25.2%	42.0%	12%
MICHIGAN <sup>28</sup>	24.0%	30.0%	7%
NEW YORK <sup>29</sup>	22.8%	30.0%	7½%
OHIO <sup>30</sup>	16.0%	16.0%	8%
TEXAS <sup>31</sup>	14.0%	18.0%	10%
WISCONSIN <sup>32</sup>	18.0%	18.0%	12%
U.C.C.C. Alt. A <sup>33</sup>	15.6%	18.0%	N/A
U.C.C.C. Alt. B <sup>34</sup>	30.0%	36.0%	N/A

It is readily apparent from the figures cited in the preceding table that small loans carry the highest rates of interest possible under the law, despite their exceeding those rates which are deemed to be usurious. Thirty-one states have small loan laws which allow interest rates of 30 percent or more;<sup>35</sup> and, there are seven states with statutes that acquiesce to rates of 20 percent or more.<sup>36</sup> Few states remain which have maximum interest rates of 18 percent or lower. So, the low income borrower has no relief in sight from these exorbitant rates on the small

24. Max. Rate; CAL. FIN. CODE ANN. § 22451 (West 1968). Usury; CAL. CONST. CODE ANN. art 20, § 22 (West Supp. 1972).

25. Max. Rate; COLO. REV. STAT. ANN. ch. 73, art. 3, § 14 (1963). Usury; COLO. REV. STAT. ANN. ch 73, art 1, § 1 (Supp. 1969).

26. Max. Rate; GA. CODE ANN. Title 25, § 315 (1971). Usury; GA. CODE ANN. Title 57, § 116 (1971).

27. Max. Rate; HAWAII REV. STAT. ch. 409, § 16 (1968). Usury; HAWAII REV. STAT. ch. 478, § 3 (1968).

28. Max. Rate; MICH. STAT. ANN. Title 23, § 667(13) (1971). Usury; MICH. STAT. ANN. Title 19, § 15(1) (Supp. 1972).

29. Max. Rate; N.Y. BANK LAW § 352 (McKinney 1971). Usury; N.Y. GEN. OBLG. LAW § 5-501 (McKinney Supp. 1972).

30. Max. Rate; OHIO REV. CODE ANN. ch. 1321, § 13 (Supp. 1972). Usury; OHIO REV. CODE ANN. ch. 1343, § 01 (Supp. 1972).

31. Max. Rate; TEX. CIV. STAT. ANN. art. 5069, § 3.15 (1971). Usury; TEX. CIV. STAT. ANN. art 5069, § 1.02 (1971).

32. Max. Rate; WIS. STAT. ANN. ch. 422, § 201(2)(a) (Supp. 1973). Usury; WIS. STAT. ANN. ch. 138, § 05(1)(a) (Supp. 1973).

33. UNIFORM CONSUMER CREDIT CODE, Working Draft No. 6, § 3.508, Alt. A (1967).

34. UNIFORM CONSUMER CREDIT CODE, Working Draft No. 6, § 3.508, Alt. B (1967).

35. See appendix: Alabama, Alaska, Arizona, California, Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, Washington, West Virginia, & Wyoming.

36. See appendix: Kentucky, Mississippi, Montana, New Hampshire, New Jersey, & South Carolina.



loans necessity forces him to seek. At this point, however, it should be noted that somewhat higher interest rates are justified on these small unsecured personal loans because of the credit risks involved. Nonetheless, these risks to the finance companies are not a sufficient rationalization for their charging the exceedingly high rates which they do.

The crux of the problem for the necessitous borrower is that the finance companies do, in fact, use the aforementioned rationalization to charge burdensome interest rates, and are allowed to do so in that most of them are exempted from having to comply with usury law interest rate limitations imposed by their respective states. Even if loans are made that are usurious, the penalties are generally nominal.<sup>37</sup> Only the State of Arkansas effectively enforces its usury law, by imposing a 10 percent interest ceiling across the board, with no exemptions for any lenders.<sup>38</sup>

To put the problems occasioned by such lack of effective legislative control in sharper perspective we will look to the history of a single state which typifies the situation in most other jurisdictions.

#### *History of Usury in California*

Prior to 1909, there was no general usury law in California.<sup>39</sup> In that year regulations were first imposed on personal property brokers.<sup>40</sup> Personal property brokers, including small loan or finance companies are those engaged in lending money with personal property being all or part of the security for the loan.<sup>41</sup> They developed as a special class of lenders, who would loan money for short terms on collateral that was thought of as unacceptable to banks.<sup>42</sup> This was a reaction to the evolution of a special class of borrowers who were poor in comparison to the traditional bank clientele. Such brokers were permitted to charge up to 5 percent per month on a loan,<sup>43</sup> or 60 percent a year. When it became obvious that the new class of borrowers was being subjected to this usurious practice, the voting population of California passed an initiative to curtail it.<sup>44</sup>

This statute was intended to cover all lenders, and put a maximum annual interest rate at 12 percent.<sup>45</sup> The enforcement section provided

---

37. See note 7, *supra*.

38. See text accompanying note 23, *supra*. See generally Comment, *Usury and Conflicts*, 55 CALIF. L. REV. 123, 178 (1967).

39. See note 12, *supra*.

40. Cal. Stats. 1909, ch. 634, §§ 1, 2, at 969. See Comment, *supra* note 12.

41. CAL. FIN. CODE ANN. § 22009 (West 1968).

42. See Comment, *supra* note 12.

43. See note 40, *supra* and accompanying text.

44. CAL. CIV. CODE § 1916-1 *et. seq.* (West Supp. 1973).

45. W. Warren, *California House Financing*, 8 U.C.L.A. L. REV. 555, 565 (1961).



for forfeiture of his loan by any personal property broker found in violation of the statute.<sup>46</sup> Further, it was intended to repeal all previous regulations for lenders,<sup>47</sup> including personal property brokers.<sup>48</sup> Court decisions in the following decade extended the application of the Usury Law to forbearances,<sup>49</sup> and to re-financing of the original loan.<sup>50</sup>

Unfortunately, this trend of further extending protection against usurious practices was soon reversed. In 1934, a legislative referendum to amend the State Constitution was presented to the California voters.<sup>51</sup> The effect of its acceptance was to exempt almost every lending institution from the interest rate regulations.<sup>52</sup> Ostensibly, the amendment's lowering of the interest rate ceiling on all loans from 12 percent to 10 percent annually was advantageous to the necessitous borrower. However, this is not an accurate picture of the amendment's true effect; in reality, the exemptions negate this apparent benefit. Since almost all lending institutions are exempt from the lowered rate, the necessitous borrower is subjected to the independent regulations set up by these institutions themselves. Even though further legislation has been presented, to the state lawmakers, as recently as 1971, it has not been accepted.<sup>53</sup> Hence, the State of California does not presently have an effective usury law with respect to small loans.

### Conclusion

What is needed is a promulgation of new and viable Consumer Protection legislation similar to that in effect in Wisconsin. The Wisconsin act lowers the maximum rate of interest on small loans from 30 percent to 18 percent annually.<sup>54</sup> In California, another logical alternative would be to amend the State Constitution to eliminate the existing exemptions, and to allow for strict enforcement of the present 10 percent interest ceiling on all loans. Such effective protection has yet to materialize in any but two of the fifty United States.<sup>55</sup> Lacking these

46. *In re Washer*, 200 Cal. 598, 254 P. 951 (1927).

47. Recent Decision, *Usury: Personal Property Brokers: Pawnbrokers*, 19 CALIF. L. REV. 213 (1931).

48. *Crooks v. People's Finance & Thrift Co.*, 1 Cal. Supp. 86, 292 P. 1065, 1067 (1930).

49. "Forbearance" is defined as an "Act by which creditor waits for payment of debt due him by debtor after it becomes due." BLACK'S LAW DICTIONARY 733 (Rev. 4th ed. 1968), (citing *Upton v. Gould*, 64 Cal. App. 2d 814, 149 P.2d 731, 733 (1944)).

50. *Aitken v. Southwest Fin. Corp. of Cal.*, 131 Cal. App. 95, 104, 20 P.2d 1000, 1003 (1933).

51. W. Warren, *California Housing Financing*, *supra* note 45, at 562.

52. CAL. CONST. CODE ANN. art 20, § 20 (West Supp. 1972). This section includes: Building and Loan Associations, Credit Unions, Pawnbrokers, Personal Property Brokers, Banks, and Agricultural Cooperatives.

53. California Senate Bill 738, which would have enforced the Usury Law, died in committee. Cal. Final Calendar of Legislative Business, 1971 Sess. 249. The Senate Judiciary Committee is at present studying the U.C.C.C. as modified by the usage of Personal Property Brokers interest rates. Cal. Sen. J. 1971 Sess. 1617.

54. WIS. STAT. ANN. ch. 422, § 201 (Supp. 1972).

55. The two exceptions are Arkansas and Wisconsin, *supra* notes 38 & 54 respectively.



necessary prophylactic devices, the necessitous borrower will bury himself further in debt.

Due to the general inflationary trend in our society, one pays more to buy less. Hence, those of low income must borrow more or more often to meet their present needs, as well as to alleviate their prior indebtedness. Ironically, the exorbitant interest rates which the finance companies force them to pay, on the very money they borrow to extricate themselves, actually compounds their plight. Obviously, then, without potent regulation of the finance companies' lending practices, the situation of the poor who turn to them for help can only get worse. This in turn may tend to cause a greater economic stratification of our society, a result which is obviously undesirable.

—ERIC R. YAMAMOTO



### *Appendix*

The purpose of this appendix is to illustrate the discrepancies between the usury rate (maximum contractual rate of interest for a loan) and the maximum rate of interest permissible by the small loan acts of the 50 states. For uniformity, all of the interest rates will be expressed in annual percentage.

<i>STATE</i>	<i>USURY</i>	<i>MAXIMUM RATES</i>
ALABAMA	Over 8%	36% 0 to \$200 24% \$200 to \$300
ALA. CODE (Michie Co.)	9 § 60 (Supp. 1971)	5 § 290 (Supp. 1971)
ALASKA	Over 8%	36% 0 to \$400 24% \$400 to \$800 12% \$800 to \$1,500
ALAS. STAT. (Michie Co.)	45.45.010 (Supp. 1971)	06.20.230 (Supp. 1971)
ARIZONA	Over 10%	36% 0 to \$300 24% \$300 to \$600
ARIZ. REV. STAT. ANN. (West)	44-1201 (Supp. 1972)	6-622 (Supp. 1972)
ARKANSAS	Over 10%	10%
ARK. STAT. ANN. (Bobbs-Merrill Co.)	Const. Art. XIX § 13 (1947)	Id.
CALIFORNIA	Over 10%	30% 0 to \$200 24% \$200 to \$500 18% \$500 to \$700 12% \$700 to \$1,500
CAL. CODE ANN. (West)	Const. Art. XX § 22 (Supp. 1972)	Fin. § 22451 (Supp. 1972)



STATE	USURY	MAXIMUM RATE
COLORADO	Over 6%	36% 0 to \$300 18% \$300 to \$500 12% \$500 to \$1,500
COLO. REV. STAT. ANN. (Bradford-Robinson Co.)	73-1-1 (Supp. 1969)	73-3-14 (1963)
CONNECTICUT	Over 12%	17% 0 to \$300 11% \$300 to \$1,800
CONN. STAT. ANN. (West)	37 § 4 (1958)	36 § 233 (Supp. 1972)
DELAWARE	Over 9%	7% interest 2% service fee 5% late fine
DEL. CODE ANN. (West)	6 § 2301 (Supp. 1970)	5 § 2108 (Supp. 1970)
FLORIDA	Over 10%	36% 0 to \$300 24% \$300 to \$600
FLA. STAT. ANN. (West)	687.02 (1966)	516.14 (1972)
GEORGIA	Over 6%	16% 0 to \$600 12% \$600+
GA. CODE ANN. (Harrison Co.)	§ 57-116 (1971)	§ 25-315 (1971)
HAWAII	Over 12%	42% 0 to \$100 30% \$100 to \$300
HAWAII REV. STAT. (State printer)	478-3 (1968)	409-16 (1968)
IDAHO	Over 10%	36% 0 to \$300 21% \$300 to \$1,000 15% \$1,000 to \$1,500
IDAHO CODE (Bobbs-Merrill Co.)	28-22-105 (Supp. 1972)	28-33-508 (Supp. 1972)



<i>STATE</i>	<i>USURY</i>	<i>MAXIMUM RATE</i>
ILLINOIS	Over 8%	36% 0 to \$150 24% \$150 to \$300 12% \$300 to \$800
ILL. STAT. ANN. (West)	74 § 4 (Supp. 1972)	74 § 31 (Supp. 1972)
INDIANA	Over 8%	36% 0 to \$300 21% \$300 to \$1,000 15% \$1,000 to \$1,500
IND. STAT. ANN. (Bobbs-Merrill Co.)	Const. Art. 11 § 9 (1955)	19-23-508 (Supp. 1972)
IOWA	Over 9%	36% 0 to \$150 24% \$150 to \$300 18% \$300 to \$700 12% \$700+
IOWA CODE ANN. (West)	535.2 (Supp. 1972)	536.13 (Supp. 1972)
KANSAS	Over 10%	36% 0 to \$300 10% \$300+
KAN. GEN. STAT. ANN. (State Printer)	16-202 (Supp. 1961)	16-410 (Supp. 1961)
KENTUCKY	Over 6%	20% 0 to \$300 16% \$300 to \$800 13% \$800 to \$1,200
KY. REV. STAT. (Bobbs-Merrill Co.)	360.010 (Supp. 1972)	288.530 (1972)
LOUISIANA	Over 8%	36% 0 to \$800 27% \$800 to \$2,000 21% \$2,000 to \$3,500 15% \$3,500 and above
LA. STAT. ANN. (West)	Civ. Code § 2924 (Supp. 1972)	9:3519 (Supp. 1972)



STATE	USURY	MAXIMUM RATE
MAINE	Over 12%	30% 0 to \$300 18% \$300+
ME. REV. STAT. ANN. (West)	9 § 3086 (Supp. 1972)	9 § 3081 (Supp. 1972)
MARYLAND	Over 8%	36% 0 to \$300 24% \$300 to \$500
MD. CODE ANN. (Michie Co.)	49 § 3 (Supp. 1972)	58A § 16 (1972)
MASSACHUSETTS	Over 6%	18% \$1,000 or less
MASS. GEN. LAWS ANN. (West)	107 § 3 (1958)	140 § 90 (1958)
MICHIGAN	Over 7%	30% 0 to \$300 15% \$300 to \$1,000
MICH. STAT. ANN. (Callaghan & Co.)	19:15 (1) (Supp. 1972)	23:667 (13) (1971)
MINNESOTA	Over 8%	33% 0 to \$300 18% \$300 to \$600 15% \$600 to \$900
MINN. STAT. ANN. (West)	334.01 (1966)	56.13 (1970)
MISSISSIPPI	Over 8%	24% \$100+
MISS. CODE ANN. (Harrison Co.)	§ 36 (Supp. 1971)	§ 5591-09 (Supp. 1971)
MISSOURI	Over 8%	15% 0 to \$500 8% \$500+
MO. STAT. ANN. (West)	408.030 (Supp. 1972)	408.100 (Supp. 1972)



<i>STATE</i>	<i>USURY</i>	<i>MAXIMUM RATE</i>
MONTANA	Over 10%	20% 0 to \$300 16% \$300 to \$500 12% \$500 to \$1,000
MONT. REV. CODE ANN. (Allen Smith Co.)	47-125 (1961)	47-210 (Supp. 1971)
NEBRASKA	Over 9%	30% 0 to \$300 24% \$300 to \$500 18% \$500 to \$1,000 12% \$1,000 to \$3,000
NEB. REV. STAT. (Dennis & Co.)	45-101 (1968)	45-137 (1968)
NEVADA	Over 12%	9% 0 to \$1,000 8% \$1,000 to \$2,500 12% 0 to \$200 service fee 6% \$200 to \$400 ser- vice fee
NEV. REV. STAT. (State Printer)	99.050 (1970)	675.290 (1970)
NEW HAMPSHIRE	Over 6%	24% 0 to \$600 18% \$600 to \$1,500 18% \$1,500+
N.H. REV. STAT. ANN. (Equity Publishing Co.)	336:1 (1966)	399-A:3 (1968)
NEW JERSEY	Over 6%	24% 0 to \$500 22% \$500 to \$1,000
N.J. STAT. ANN. (West)	31:1-1 (Supp. 1972)	17:10-14 (Supp. 1972)
NEW MEXICO	Over 12%	36% 0 to \$150 30% \$150 to \$300 12% \$300 to \$1,000
N.M. STAT. ANN. (Allen Smith Co.)	50-6-5 (1962)	48-17-43 (1966)



STATE	USURY	MAXIMUM RATE
NEW YORK	Over 7½%	30% 0 to \$100 24% \$100 to \$300 18% \$300 to \$900 15% \$900 to \$1,400
N.Y. LAWS (McKinney) (West)	Gen. Oblg. 5-501 (Supp. 1972)	Bank 352 (1971)
NORTH CAROLINA	Over 7%	18% 0 to \$300 10% \$300 to \$600 8% \$600 to \$900
N.C. GEN. STAT. (Michie Co.)	24-1 (Supp. 1971)	53-173 (Supp. 1971)
NORTH DAKOTA	Over 7%	30% 0 to \$250 24% \$250 to \$500 21% \$500 to \$750 18% \$750 to \$1,000
N.D. CODE ANN. (Allen Smith Co.)	47-14-09 (Supp. 1971)	13-03-14 (1971)
OHIO	Over 8%	16% 0 to \$500 9% \$500 to \$1,000 7% \$1,000 to \$2,000
OHIO REV. CODE ANN. (Anderson Co.)	1343.01 (Supp. 1971)	1321.13 (Supp. 1971)
OKLAHOMA	Over 10%	30% 0 to \$300 21% \$300 to \$1,000 15% \$1,000+
OKLA. STAT. ANN. (West)	Const. Art. 14 § 2 (Supp. 1972)	14A § 2-201 (Supp. 1972)
OREGON	Over 10%	36% 0 to \$300 24% \$300 to \$500 12% \$500 to \$1,500
ORE. REV. STAT. (Binsford & Mort Pub.)	82.010 (1971)	725.340 (1971)



<i>STATE</i>	<i>USURY</i>	<i>MAXIMUM RATE</i>
PENNSYLVANIA	Over 6%	36% 0 to \$150 24% \$150 to \$300 12% \$300 to \$600
PA. STAT. ANN. (West)	41 § 3 (1971)	7 § 6152 (1967)
RHODE ISLAND	Over 21%	36% 0 to \$300 30% \$300 to \$800 24% \$800 to \$2,500
R.I. GEN. LAWS (Bobbs-Merrill Co.)	6-27-4 (Supp. 1971)	19-25-25 (1968)
SOUTH CAROLINA	Over 8%	20% 0 to \$100 18% \$100 to \$300 9% \$300 to \$1,000
S.C. CODE LAWS (Michie Co.)	§ 8-3 (Supp. 1971)	§ 8-800.10 (Supp. 1971)
SOUTH DAKOTA	Over 10%	30% 0 to \$300 24% \$300 to \$600 18% \$600 to \$1,200 12% \$1,200 to \$2,500
S.D. LAWS ANN. (Allen Smith Co.)	54-3-7 (Supp. 1972)	54-6-2 (Supp. 1972)
TENNESEE	Over 6%	6% interest 12% service fee
TENN. CODE ANN. (Bobbs-Merrill Co.)	47-14-104 (Supp. 1972)	45-2113 (1964)
TEXAS	Over 10%	18% 0 to \$300 8% \$300 to \$2,500
TEX. CIV. STAT. ANN. (West)	5069-1.02 (1971)	5069-3.15 (1971)
UTAH	Over 6%	36% 0 to \$300 21% \$300 to \$1,000 15% \$1,000+
UTAH CODE ANN. (Allen Smith Co.)	15-1-1 (1953)	70B-3-508 (Supp. 1971)



STATE	USURY	MAXIMUM RATE
VERMONT	Over 7½%	14% 0 to \$1,500
VT. STAT. ANN. (Equity Publishing Co.)	9 § 41 (1971)	8 § 2223 (1971)
VIRGINIA	Over 8%	30% 0 to \$300 18% \$300 to \$1,000
VA. CODE (Michie Co.)	§ 6.1-319 (Supp. 1972)	§ 6.1-272 (Supp. 1972)
WASHINGTON	Over 12%	36% 0 to \$300 18% \$300 to \$500 12% \$500 to \$1,000
WASH. REV. CODE ANN. (West & Bancroft-Whitney	19.52.020 (Supp. 1971)	31.08.160 (1961)
WEST VIRGINIA	Over 8%	36% 0 to \$200 24% \$200 to \$600 18% \$600 to \$800
W. VA. CODE (Michie Co.)	§ 47-6-5 (Supp. 1972)	§ 47-7A-13 (1966)
WISCONSIN	Over 12%	18% 0 to \$500 12% \$500+
WIS. STAT. ANN. (West)	138.05 (Supp. 1972)	422.201 (Supp. 1972)
WYOMING	Over 7%	36% 0 to \$300 21% \$300 to \$1,000 15% \$1,000+
WYO. STAT. ANN. (Michie Co.)	§ 13-477 (supp. 1971)	§ 40-3-508 (Supp. 1971)
UNIFORM CONSUMER CREDIT CODE	N/A	18% 0 to \$300  12% \$300 to \$1,000 8% \$1,000+
Working Draft No. 6 (1967)		§ 3.508 Alt. A



<i>STATE</i>	<i>USURY</i>	<i>MAXIMUM RATE</i>
UNIFORM CONSUMER CREDIT CODE	N/A	36% 0 to \$300  21% \$300 to \$1,000 15% \$1,000+
Working Draft No. 6 (1967)		§ 3.508 Alt. B



*COMMENT*

**X-RADIATION FROM TELEVISION RECEIVERS  
AND  
THE RADIATION CONTROL FOR  
HEALTH AND SAFETY ACT OF 1968:  
THE NEED FOR MORE EFFECTIVE CONTROLS**



*Table of Contents*

	<i>Page</i>
INTRODUCTION .....	189
I. NATURE OF THE PROBLEM .....	190
A. A Brief Technical Description .....	191
B. The Nature of the Hazard .....	193
II. RADIATION CONTROL FOR HEALTH AND SAFETY ACT OF 1968 .....	197
A. Provisions of the Act .....	197
B. Objectives of the Act .....	201
C. Expected Effect of the Act .....	202
1. <i>The First Objective</i> .....	202
2. <i>The Second Objective</i> .....	203
3. <i>The Third and Fourth Objectives</i> .....	205
III. CALIFORNIA LAWS RELATING TO RADIATION AND ELECTRONIC REPAIR DEALERS .....	206
A. Radiation Control Law .....	207
B. Electronic Repair Dealer Registration Law .....	209
IV. A PROPOSAL FOR MORE EFFECTIVE LAWS .....	210
V. CONCLUSION .....	211
Appendix .....	213



Modern technology has made it possible to redistribute and intensify the natural sources of radiation found in the earth's crust. At the same time, it is now possible to produce devices that constitute *new* sources of radiation, and often such products are intended for use in the home. As a result, man (in fact, all life on earth) continually risks exposure to levels of radiation significantly higher than those that occur naturally.

In testimony before the Senate, Dr. William H. Stewart, former Surgeon General of the United States, appropriately quoted the remarks of Dr. Donald Chadwick of the U.S. Public Health Service:

Our knowledge of the biological effects of radiation has many gaps, but enough is known that practitioners of medicine, dentistry, and public health should make every feasible effort to prevent or reduce all unnecessary radiation exposures. The size of the population at risk and the possible consequences of failure to take appropriate action are too great.<sup>1</sup>

Dr. Stewart also offered the words of former Surgeon General Burney:

In law the suspect is innocent until his guilt is proven beyond a reasonable doubt. In the protection of human health, such absolute proof often comes late.

To wait for it is to invite disaster, or to suffer unnecessarily through long periods of time.<sup>2</sup>

Dr. Stewart himself went on to say:

The principal objective of the Public Health Service and other public and private organizations interested in radiation protection is to prevent exposure of the population to unnecessary radiation and to reduce to a minimum the exposures that may be necessary for medical and other beneficial applications.<sup>3</sup>

This comment is presented in the belief that no one can, or should, seriously question that there are severe consequences attached to any significant increases in the radiation levels of our environment, and that as a general principle, zealous efforts are in order to insure that mankind, individually and collectively, is not exposed to radiation levels significantly higher than those found in nature.

---

1. *Hearings on S. 2067 Before the Senate Comm. on Commerce*, 90th Cong., 1st Sess., pt. 1, at 83 (1967), [hereinafter cited as *1967 Senate Hearings*]. Dr. Chadwick had originally made this statement while addressing the 1964 Congress of Environmental Health.

2. *Id.* This statement was originally made in an address to the 1958 National Pollution Conference.

3. *Id.*



As its title suggests, this comment is directed primarily to an examination of the legal controls on the emission of X-rays from television receivers.<sup>4</sup> There are, of course other electronic products produced for use in the home that emit radiation of one kind or another. However, of all the electronic products considered capable of emitting hazardous radiation, television receivers are the most widespread and represent the greatest potential source of exposure for the public in this Country. This is made evident by noting that there were about 24,000,000 color television receivers alone in use in this country by 1970, a number representing eight times the total of all other such products "selected" for counting by the Bureau of Radiological Health.<sup>5</sup>

It should further be noted that the 24 million television sets produced before January 15, 1970 were not subject to Federal radiation emission controls. These sets were particularly susceptible to maladjustment, both by the user and by slipshod repairmen, that could result in excessive emissions. Moreover, it will be shown that sets produced subsequently under Federal controls, while not as susceptible to misadjustment, are still capable of emitting excessive radiation as a result of component failures or modifications by unwary servicemen. Thus, it is appropriate to consider the effectiveness of federal controls, and the need for similar state legislation in order to insure the complete protection of the public from electronic product radiation.

## I. THE NATURE OF THE PROBLEM

In November, 1966, the "discovery" that color television sets manufactured by General Electric were emitting significant levels of X-radiation received widespread publicity.<sup>6</sup> Considerable alarm was generated by this discovery, but the alarm was typically short-lived, and it abated soon after "health authorities" assured the public that no hazards to the public were presented by the situation.<sup>7</sup>

Ultimately, General Electric "corrected" approximately 90,000 sets already in use by the public. While the levels of radiation emitted by these sets were not widely publicized, the conclusion that General Electric thought the levels at least moderately dangerous seems inescapable

---

4. The problem of radiation from television receivers first surfaced in connection with color receivers; however, as will be discussed below in the text, black-and-white sets may also be capable of emitting X-radiation.

5. *Message From the President of the United States Transmitting the First Annual Report on the Administration of the Radiation Control for Health and Safety Act of 1968*, H.R. Doc. No. 91-126, 91st Cong., 1st Sess., at 40 (1969).

6. 1967 Senate Hearings, *supra* note 1, at 3.

7. *Id.*



in view of the fact that General Electric corrected these sets at a cost to itself of "several million dollars."<sup>8</sup>

In testimony before the Senate Commerce Committee, Mr. Ralph Nader stated that he considered it "gross negligence at the very least" that General Electric had subjected assembly line technicians to excessive radiation from these sets during their manufacture.<sup>9</sup>

Is it likely, then, that television receivers are capable of emitting radiation which might in fact be harmful to human health?

#### A. A BRIEF TECHNICAL DESCRIPTION

It has long been known as a general principle of physics that electromagnetic radiation is emitted by any process involving the acceleration of charged particles.<sup>10</sup> The frequency (and energy level) of radiation thus produced depends on the acceleration imparted to the particles; *i.e.*, the greater the acceleration, the greater the intensity and range of possible frequencies of the resulting radiation.

Vacuum tubes operate on the principle that electrons (negatively charged particles) are accelerated from one element, the cathode, to another element, the anode. The process of accelerating the electrons from the cathode produces some radiation, but the acceleration at this point is relatively gradual; the resulting radiation is of fairly low frequency, and consequently is of little significance. On the other hand, when the electrons reach the anode they are abruptly decelerated. In effect, this deceleration also represents a rapid acceleration, *in the opposite direction*. If the voltage applied between the cathode and the anode is increased, the electrons will be made to travel at a greater rate of speed, and hence will decelerate to a greater extent upon striking the anode. Thus, the higher the voltage applied, the more likely it will be that radiation will be produced.

In a general sense, then, X-radiation may be produced where electrons, accelerated at a sufficiently high voltage, strike the surface of any material which causes them to quickly decelerate. The anode of a vacuum tube is usually made of metal and, if approximately 30,000 volts or more are applied, the electrons striking this metal surface could cause the tube to emit X-radiation.

---

8. Letter to Senator E.L. Bartlett from General Electric Co., dated May 31, 1968; reported in *Hearings on S. 2067, S. 3211, and H.R. 10790 Before the Senate Comm. on Commerce*, 90th Cong., 2d Sess., pt. 2, at 936, 937 (1968), [hereinafter cited as *1968 Senate Hearings*].

9. *Id.* at 753.

10. The material herein may be authenticated by referring to R. EISBERG, *FUNDAMENTALS OF MODERN PHYSICS*, Ch. 14, "X-Rays" (1961); See Appendix Two for a brief glossary of technical terms used in this comment. Also included in Appendix Two is a short note on the nature and various forms of electromagnetic radiation.



High intensity X-rays, of a narrow frequency band, may also be produced by a second, more complicated, process. This process depends largely on the type of material which acts to decelerate the moving electrons. For instance, the use of particular types of metal in making vacuum tube anodes could result in their emitting radiation of this sort.

Most television receivers utilize a number of vacuum tubes. Indeed, the picture tube is a type of vacuum tube although it has no anode, at least not in the same sense as have other tubes. Instead, the electrons projected in a picture tube are decelerated when they strike the inside surface of the picture screen (which is a glass surface coated with phosphors that emit light when struck by the electron beam). Nonetheless, the basic process is the same in all tubes, and picture tubes have the same potential capability of producing X-rays as do tubes with metal anodes.

A picture tube normally operates at a relatively high voltage and, in order to provide it with the level of power it requires to function, the television must include a special high-voltage supply circuit. This circuit typically includes other tubes which also operate at high voltage levels (e.g., the *high-voltage rectifier tube* and the *high-voltage shunt regulator tube*). In black-and-white receivers, the voltage applied to the picture tube ranges from approximately 12,000 to 24,000 volts, while in color sets it ranges from around 24,000 volts to 32,000 volts.

The high-voltage power supplies in many television sets are capable of being adjusted — or, perhaps, *misadjusted*. Such adjustment is often made possible by design, by incorporating variable resistors in the high-voltage circuit. Misadjustment of a black-and-white television can raise the picture tube voltage to around 30,000, and in color sets, misadjustment can result in much higher voltage levels, well within the range sufficient to cause the emission of X-rays.

Since black-and-white televisions would have to be *grossly* misadjusted before the picture tube supply voltage could reach the 30,000 volt range, hazardous radiation from these sets, while possible in theory, is not at all likely. In fact no instances have been reported where this has occurred. In color sets, however, the high-voltage circuit may operate normally within this range, and potentially hazardous X-radiation, emitted from both picture tubes and other high-voltage tubes, has been detected on a number of occasions.<sup>11</sup> This has often been due to misadjustment or defective components in the high-voltage circuit.

---

11. *Supplemental Hearings on H.R. 10790 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., ser. 27, at 17-19 (1968), [hereinafter cited as *1968 Supplemental Hearings*].



It is interesting to note that Roentgen discovered X-radiation in 1895 while experimenting with a device similar to a picture tube (in which electrons were decelerated by striking a glass surface). Knowing this, television manufacturers should certainly have been aware of the potential X-ray producing capabilities of their products at an early stage in their development. This should have led the manufacturers to ascertain the extent of possible hazards, especially insofar as misadjustment and component malfunctions were readily foreseeable.

It is important to recognize that whether or not X-rays are emitted under certain conditions may depend on a number of other factors besides the voltage used to accelerate electrons, and the nature of the material which they strike. For the purposes of this discussion, however, it must be kept in mind that the use of particular materials and higher voltage levels in television tubes may substantially increase the likelihood that they will emit X-radiation.

#### B. THE NATURE OF THE HAZARD

In order to assess the potential hazards created by the emission of X-rays from television receivers, it is necessary to consider briefly the biological effects of exposure to various levels of radiation. In 1959, the National Council on Radiation Protection and Measurements (NCRP)<sup>12</sup> recommended that the emission rate at a distance of 5 cm (about two inches) from any outer surface of a home television receiver should not exceed 0.5 milliroentgen (mr) per hour.<sup>13</sup> A maximum annual exposure to members of the general public of 500mr has also been recognized as an acceptable standard for the protection of health.<sup>14</sup>

---

12. The National Council on Radiation Protection and Measurements (NCRP) was established in 1929 as the result of a cooperative effort between the radiological and medical organizations existing at the time, and the National Bureau of Standards. The NCRP is a private, non-profit organization similar to the National Academy of Sciences, but operating on a smaller scale. It is certified by Federal Charter. For a list of NCRP publications concerning various problems involving radiation, see *1967 Senate Hearings*, *supra* note 1, at 385, 386.

13. *1967 Senate Hearings*, *supra* note 1, at 363; *1968 Senate Hearings*, *supra* note 8, at 675-678.

The roentgen (r) is a basic unit of radiation which is defined in terms of the energy lost by radiation as it passes through air. When considering the effects of radiation on human health a different measure is often used, the roentgen equivalent man (rem). This is defined as the amount of any type of radiation which, when absorbed by man, will produce the same biological effects as the absorption of one roentgen of gamma or X-radiation. When discussing the biological effects of X-rays, then, these two measures would be equivalent. (To avoid confusion, only the roentgen measure will be used in this discussion.) The rate of exposure to radiation is usually considered by using the standard roentgens per hour (r/hr). See A. MELISSINOS, *EXPERIMENTS IN MODERN PHYSICS* at 143 (1966).

14. *Hearings on the Administration of the Radiation Control For Health and Safety Act of 1968 (Public Law 90-602) Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess., at 283 (1969), [hereinafter cited as *1969 House Hearings*].



Imagine a hypothetical viewer who watches three hours of television a day from a set held in his lap. If the set conforms to the NCRP standard, our viewer will receive about 550mr of radiation in a year. Of course, such a viewer would obviously represent a very small portion of the population. Most people presumably watch from a distance of at least three feet, so the dosages received should be much smaller on the average than that incurred by our hypothetical viewer. Thus, the standard at 5 cm is set on the assumption that dosages at greater distances would be safe.

Nevertheless, it is interesting (if not frightening) to note that in one experiment in which a General Electric color television was operated with a defective high-voltage shunt regulator tube (but otherwise under normal conditions), the following X-ray emission levels were measured:

1. 640 mr/hr at a distance of 33½ inches (85 cm.) below the anode of the shunt regulator tube, after passing through a simulated apartment floor and ceiling, and
2. 83,200 mr/hr at the surface of the floor, 12¼ inches (31 cm.) below the tube anode.
3. Calculations show that the exposure rate near the underside of the receiver at the ventilating louvers would be at least 800,000 mr/hr, 4 inches (10 cm.) below the tube anode.<sup>15</sup>

This last figure indicates an exposure of a whopping 800 roentgens per hour! A dose of from 450 to 600 roentgens to the whole body will in most cases cause serious injury or death within a few weeks, if the exposure was received within a short period of time.<sup>16</sup> Symptoms such as nausea and vomiting usually occur within 24 hours. These may be followed by a feeling of well-being lasting a few days, then severe prostration, diarrhea, fever, loss of hair, and tachycardia (rapid heartbeat) which may last for weeks.

Even if the person recovers, new symptoms (such as cancer) may occur at a later date.<sup>17</sup> Transient effects would occur with much lower doses of 50 to 100 roentgens delivered within a short period of time.<sup>18</sup> Chronic low dosage over a long period of time, such as one might receive from a television receiver, produces less dramatic results.<sup>19</sup>

---

15. 1967 Senate Hearings, *supra* note 1, at 189, 198-200.

16. A. MELISSINOS, EXPERIMENTS IN MODERN PHYSICS at 147 (1966).

17. See G. HUTTON, LEGAL CONSIDERATIONS ON IONIZING RADIATION at 26 (1966).

18. *Id.* at 27.

19. Chronic low radiation dosages may produce unusually dry skin, chapping, loss of hair, warts, slow healing of skin injuries, brittle fingernails, blurred or blunted fingerprints, cataracts of the eye, sterility, changes in blood composition (the most common being leukemia), and genetic defects. *Id.* at 27, 28.



Under certain conditions, a clear relationship has been demonstrated between leukemia and prior radiation exposure. For example, leukemia has occurred after acute exposures of 100 to 500 roentgens to the whole body; after acute doses, possibly as low as 2 to 5 roentgens, to the fetus; and after doses greater than 100 roentgens to the neck region of children.<sup>20</sup>

The biological inheritance mechanism is probably the most sensitive to radiation because human genes are affected by almost any radiation that reaches the reproductive cells, causing mutations which are passed onto succeeding generations. Because all of us are subjected to natural background radiation, an unavoidable number of so-called "spontaneous" mutations occur continually. Anything that adds radiation above this background level, though, may be considered genetically harmful. There is no minimum level of exposure which must be exceeded before some damage will result. Any amount of radiation that reaches the reproductive cells can cause a corresponding number of mutations; the more radiation the more mutations.<sup>21</sup> Moreover, the effects of radiation are cumulative, and the amount of organic damage continues to build up as more radiation is received.

Taking the population as a whole, a little radiation to a lot of people over a long time span can be considered more harmful than a lot of radiation to a few. While the total number of mutant genes may be the same in both cases, they are more likely to survive and affect future generations in the former. This is because a lot of radiation may either kill directly those exposed, or it may cause such serious mutations that their offspring will not survive, and hence the mutant inheritance line will quickly die out.<sup>22</sup>

It is certainly possible that some individuals could receive dangerously large doses of X-radiation from television sets. Suppose, for example, that a child sleeps in the upper bunk of a bunk bed, and that a color set with a defective high-voltage shunt regulator tube is located directly above on the next floor. If the child goes to bed at 8:00 p.m. and the television is operated nightly between 8:00 and 11:00 p.m., it is conceivable, from the results of the experiment cited above, that the child would be exposed to almost 2 roentgens in a single evening. This would amount to over 700 roentgens in the course of a year. Remember that the recognized health standard is set at a maximum exposure of

---

20. 1967 Senate Hearings, *supra* note 1, at 375.

21. The average exposure to the gonads over a thirty year period would be about 4.3 r from background radiation, 3 r from medical X-rays and fluroscopy, and 0.1 r from the residual radiation from nuclear weapons tests. The average dental X-ray causes an exposure to the gonads of about 1/5,000 r. See *id.* at 381.

22. *Id.* at 380, 381.



only 500 *milliroentgens*, or only *one-half* of a roentgen per year. The sleeping child has thus been exposed to 1,400 times the amount of radiation which is considered safe.

Nonetheless, it has been argued by a number of independent experts that no hazard exists with radiation from color TV sets. For example, Dr. Hanson Blatt, director of Radiological Control, New York City Health Department, in April of 1969 stated:

...X-radiation is 'trivial' from color TV sets...; ...field testing of color TV sets for X-radiation would make about as much sense as pulling the Belgian stone blocks out of certain roads in the Bronx. [These blocks] emit 25 millirontgens [sic] [of radiation] per year.<sup>23</sup>

These remarks are typically conclusory. No analysis to support the conclusion is provided. (One might note that radiation of 25 mr/year corresponds to approximately 0.003 mr/hour, a rate hardly comparable to the 0.5 mr/hr NCRP standard.)

In 1968 Dr. V.P. Bond, Associate Director of the Brookhaven National Laboratory, had this to say:

...[W]hile it is prudent to control and severely limit exposure to radiation, ...it is quite clear that the probability of significant or even detectable medical effects from X-rays emitted by faulty color television receivers is vanishingly small.<sup>24</sup>

Dr. Robert D. Mosely, Jr., of the University of Chicago, also observed:

...[T]he biological risk of radiation from color television receivers is negligible. ...[B]ecause the quality of this radiation is such that it is absorbed in the first few millimeters of the skin and therefore is markedly or completely attenuated before it reaches the depth of the critical organs [gonads and bone marrow].<sup>25</sup>

It thus appears that some experts do not agree that television sets present a potential radiation hazard, and they seem quite willing to adopt a "wait and see" approach, or discount the matter entirely. But it *has* been established that X-radiation is potentially dangerous to health, and it seems reasonable to assume that X-radiation from TV

---

23. 1969 House Hearings, *supra* note 14, at 282.

24. Excerpt from a letter dated February 20, 1968, written by Dr. V.P. Bond, Associate Director, Brookhaven National Laboratory, reproduced in 1968 Senate Hearings, *supra* note 8, at 678.

25. Excerpt from a letter dated May 3, 1968, written by Dr. Robert D. Mosely, Jr., Professor and Chairman of the Department of Radiology, University of Chicago, reproduced in 1968 Senate Hearings, *supra* note 8, at 680.



sets may present some hazard. It seems foolhardy then, to adopt such an attitude when the consequences may be so grave, and while the solution may be quite simple.

## II. RADIATION CONTROL FOR HEALTH AND SAFETY ACT OF 1968

Subsequent to the General Electric episode in 1966, a study was conducted by the Suffolk County Department of Health in New York.<sup>26</sup> This study, conducted in 1967, surveyed approximately 5,000 color television sets, and found that 20% of these were emitting radiation in excess of the 0.5 mr/hr standard established by the National Council on Radiation Protection and Measurements. The study was widely publicized, and it quickly aroused the interest of the Federal Government. The first bill submitted to Congress concerning this problem was introduced on July 10, 1967 by Senator Bartlett of Alaska.<sup>27</sup> Subsequently two other bills were introduced, one in each House.<sup>28</sup>

A series of hearings was conducted in both the House and the Senate.<sup>29</sup> Testimony was heard from members of the Federal, state, and local governments, the scientific community, the electronics industry, professional trade associations, labor unions, and from other individuals. The purpose of the hearings, in the words of Senator Bartlett, was to

...gain an overview of the wide and growing range of devices which utilize or give off ionizing or other types of radiation, to learn what health hazards might be involved, and to devise an effective program for surveillance and control.<sup>30</sup>

On October 18, 1968, Congress enacted the Radiation Control for Health and Safety Act of 1968 (hereinafter referred to as the Act).<sup>31</sup>

### A. PROVISIONS OF THE ACT

The declared purpose of the Act is to insure "...that the public health and safety...be protected from the dangers of electronic product radiation."<sup>32</sup>

26. 1969 House Hearings, *supra* note 14, at 276.

27. S. 2067, 90th Cong., 1st Sess. (1967).

28. S. 3211, 90th Cong., 2d Sess. (1968); H.R. 10790, 90th Cong., 1st Sess., (1967).

29. 1967 Senate Hearings, *supra* note 1; 1968 Senate Hearings, *supra* note 8; Hearings on H.R. 10790 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce, 90th Cong., 1st Sess., (1967); 1968 Supplemental Hearings, *supra* note 11.

30. 1967 Senate Hearings, *supra* note 1, at 1.

31. The Radiation Control for Health and Safety Act of 1968, Pub. L. No. 90-602; 82 Stat. 1173 (1968); codified at 42 U.S.C. § 263b *et seq.*

32. 42 U.S.C. § 263b (1971).



The Act defines an "electronic product" as:

(A) any manufactured or assembled product which, when in operation, (i) contains or acts as part of an electronic circuit and (ii) emits (or in the absence of effective shielding or other controls would emit) electronic product radiation, or

(B) any manufactured or assembled article which is intended for use as a component, part, or accessory of a product described in clause (A) and which when in operation emits (or in the absence of effective shielding or other controls would emit) such radiation.<sup>33</sup>

This definition clearly includes not only television receivers, microwave ovens, and X-ray machines used in medicine and science, but would also encompass all products which might purposefully or incidentally emit radiation, including those which may be introduced in the future.

"Electronic product radiation" is defined as "any ionizing or non-ionizing electromagnetic or particulate radiation" and as "any sonic, infrasonic or ultrasonic radiation. . . ."<sup>34</sup>

The Act directs the Secretary of Health, Education and Welfare (hereinafter referred to as the Secretary) to establish and carry out an electronic product radiation control program. Under this program, the Secretary is to "plan, conduct, coordinate, and support research, development, training and operational activities to minimize the emissions of . . . unnecessary electronic product radiation. . . ."<sup>35</sup>

In hearings before the House Subcommittee on Public Health and Welfare, which was considering the administration of the Act, the Director of the Bureau of Radiological Health reported on the Bureau's "X-Radiation Control Programs in the Color Television Industry."<sup>36</sup> This report states that under the program's objectives, factory visits by Bureau staff members gave them the opportunity to "... review efforts being made in the design of current and future models of receivers for the reduction of X-ray emissions. . . . [and] to review servicing procedures recommended by the manufacturer for receivers currently on the market. . . ."<sup>37</sup> During these hearings several witnesses were questioned about the possibilities of developing "fail-safe" systems to prevent dangerous component malfunctions and of eliminating any need for repairmen to "adjust" the high voltage circuits in television receivers.<sup>38</sup> It is apparent

---

33. 42 U.S.C. § 263c(2) (1971).

34. 42 U.S.C. § 263c(1) (1971); See Glossary, Appendix Two.

35. 42 U.S.C. § 263d(a)(2) (1971).

36. 1969 House Hearings, *supra* note 14, at 23.

37. *Id.* at 25.

38. *Id.* at 286-289.



that these legislators considered component failures and shoddy repair practices to be major causes of hazardous television emissions. It is thus also apparent that the Act was intended to encompass these problems.

Under the Act, the Secretary is also required to report to Congress the results of various studies conducted from time to time as he may find necessary, with recommendations for appropriate legislation.<sup>39</sup> The Secretary is also required to conduct studies into the feasibility of entering

...into arrangements with individual States or groups of States to define their respective functions and responsibilities for the control of electronic product radiation and other ionizing radiation. . . .<sup>40</sup>

Furthermore, the Secretary is to prescribe radiation level "performance standards" for electronic products (presumably on a product-by-product basis) when deemed necessary for the protection of public health and safety (the first such standard was to be set prior to January 1, 1970).<sup>41</sup>

Electronic products intended solely for export are exempted from such performance standards so long as they meet the standards--if any--of the importing country.<sup>42</sup>

The Act also provides for the judicial review of the performance standards imposed in the case of an "actual controversy."<sup>43</sup>

Every electronic product marketed in the United States which is subject to such a performance standard must bear a written certification that it conforms to that standard. This certification by the manufacturer must be based on either (1) a test of the individual item, or (2) a testing program "...which is in accord with good manufacturing practice and which has not been disapproved by the Secretary. . . ."<sup>44</sup> The obvious purpose of such certification is to insure that no television receiver or other product is sold which emits radiation in excess of the prescribed standard.

39. 42 U.S.C. § 263e(a) (1971).

40. 42 U.S.C. § 263e(a)(1)(F) (1971).

41. 42 U.S.C. § 263f(a)(1) (1971). These performance standards are to be imposed in the form of Federal Regulations, and they may be found in 42 C.F.R. § 78 *et seq.* The Act requires the Secretary to appoint a 15 member "Technical Electronic Product Safety Standards Committee" and to consult this Committee before prescribing any new performance standards. 42 U.S.C. § 263f(f). This Committee is to be composed of five members from each of: 1) governmental agencies, 2) the electronics industry, and 3) the general public. *Id.*

42. 42 U.S.C. § 263f(a)(3) (1971).

43. 42 U.S.C. § 263f(d)(1) (1971).

44. 42 U.S.C. § 263f(h) (1971).



In the event that a manufacturer discovers a radiation defect in a product after it leaves his possession, which defect would indicate non-compliance with the performance standard, he is required to notify immediately the Secretary of such, as well as any distributor, dealer, or consumer to whom the product has been delivered.<sup>45</sup> However, the Secretary may exempt the manufacturer from his duty to notify distributors, dealers, and consumers if the defect is deemed not to create a "significant" risk of injury to any person.<sup>46</sup> Of course, the Secretary may determine from his own investigation that certain products do not meet the established standards.

Failure to comply with these provisions may subject the manufacturer to several liabilities.<sup>47</sup> For one thing, he is required to correct or replace, at his own expense, any items sold which do not conform to the performance standards.<sup>48</sup> This would not apply, however, with respect to products manufactured prior to the effective date of the Act.<sup>49</sup>

All imported products are subject to the same performance standards as are domestic products, and must likewise bear a certification of compliance.<sup>50</sup> Nonconforming products can be denied entry into the United States.

Furthermore, it is unlawful to violate any provision of the Act<sup>51</sup> and offenders are subject to a civil penalty of not more than \$1,000 per violation, the maximum penalty being \$300,000 for a series of related

---

45. 42 U.S.C. § 263g (1971).

46. 42 U.S.C. § 263g(a)(1) (1971).

47. In theory at least, the manufacturer of an electronic product that emits harmful radiation could be held civilly liable in tort for any injury caused to a user of the product. Depending on the jurisdiction in which such an action is brought, the manufacturer might be sued on theories of strict liability for defective product (see RESTATEMENT OF TORTS 2d, § 402 A), negligence, breach of warranty, or, if the product failed to conform to a performance standard applicable to it, negligence *per se*. See generally PROSSER, THE LAW OF TORTS, ch. 19, at 658-696 (3d Ed., 1964). Whatever theory is used, however, the injured party will have to show some causal link between the radiation defect in the product and the physical harm suffered. In that the effects of chronic low-level exposures to radiation are typically long range, and may not manifest themselves for years, the aggrieved party will bear an almost impossible burden in showing that his injury was caused by *this* product, and not by some other source of radiation. Moreover, he will likely have to show that the radiation defect existed in the product *at the time it left the manufacturer's possession*. The manufacturer will surely argue that the radiation was caused by a component that just "wore out", or by improper servicing of the product.

In short, it seems unlikely that the manufacturer would be exposed to civil liability as a practical matter. As will be seen shortly, though, the manufacturer may well be subject to civil penalties imposed by the Act.

48. 42 U.S.C. § 263g(f) (1971).

49. 42 U.S.C. § 263g(g) (1971). While the Act became effective on October 18, 1968, (the date of its enactment), the Secretary did not begin prescribing performance standards until later. (The first set of standards were published on Dec. 25, 1969; 34 Fed. Reg. 20274.) Items manufactured after the effective date of the Act, but prior to the prescription of the performance standard applicable to it, would obviously not have to conform to such standard.

50. 42 U.S.C. § 263h (1971).

51. 42 U.S.C. § 263j (1971).



violations.<sup>52</sup> Moreover, it does not appear that a violation must have been committed willfully or intentionally; the offender may be held strictly accountable for his conduct. Finally, the Federal District Courts are authorized to issue injunctions to restrain the distribution or sale of products which do not conform to the applicable performance standards.<sup>53</sup>

Mention should also be made of one other potentially significant provision of the Act. As will be discussed below, the effective control of electronic product radiation may depend largely on state involvement. While the Act expressly precludes states from promulgating their own performance standards,<sup>54</sup> it does authorize the Secretary

to accept from State and local authorities engaged in activities related to health or safety or consumer protection . . . any assistance in the administration and enforcement of this (Act) which he may request and which they may be able and willing to provide. . . .<sup>55</sup>

In short, the Act establishes a broad basis for Federal-State cooperation.

#### B. THE OBJECTIVES OF THE ACT

The Act states its basic purpose as being, in broad terms, to protect the public health and safety from the dangers of electronic product radiation.<sup>56</sup> In order to assess the effectiveness of the Act in achieving this purpose, particularly with respect to television receivers, it may be helpful to discuss its provisions in terms of specific objectives.

From the material presented above, the major objectives of the Act might be restated as being:

1. to establish reasonable and safe standards for the maximum allowable radiation from electronic products;
2. to prevent the sale or distribution in this Country, by domestic or foreign manufacturers, of electronic products that emit radiation in excess of the established standards;

---

52. 42 U.S.C. § 263k(b)(1) (1971).

53. 42 U.S.C. § 263k(a) (1971).

54. 42 U.S.C. § 263n (1971). The states are allowed to impose their own performance standards, but only if such are *identical* to the Federal standards. It is important to note, however, that the setting of performance standards is the only matter which Congress has expressly sought to preempt. Ostensibly, then, the states are left free to regulate other matters concerning electronic product radiation; e.g., repair practices.

55. 42 U.S.C. § 263m (1971).

56. Note 32, *supra*.



3. to prevent electronic products in use by consumers from radiating in excess of the standards as the result of component malfunction; and

4. to prevent electronic products in use by consumers from radiating in excess of the standard as the result of improper repairs performed on such products.

### C. THE EXPECTED EFFECTIVENESS OF THE ACT

#### 1. *The First Objective*

Presumably, the first objective is being accomplished by the Secretary's promulgation of performance standards for the various types of electronic products covered by the Act.<sup>57</sup> The standard which has been applied to television receivers is the same as was recommended by the NCRP in 1959; 0.5 mr per hour at 5 cm from any surface of the receiver.<sup>58</sup> Apparently this standard was generally considered to be adequate at the time the Act was passed.<sup>59</sup> However, evidence was introduced during the hearings on the Act which indicated that any given television receiver could be "corrected" in the home so that the radiation emitted by the set would be *indistinguishable* from the natural background radiation.<sup>60</sup>

It might, then, be argued that while the NCRP standard is generally accepted as a reasonable safety limit, it is still too high because it may be possible to eliminate virtually *all* X-radiation from television sets. Moreover, since the corrections could be made in the home, industry would seem hard-pressed in any efforts to resist a "no-more-than-background" standard at the time a set leaves the factory, and it would hardly be unreasonable to impose such a standard.

---

57. The performance standards are published in the Code of Federal Regulations; see 42 C.F.R. § 78.210 *et. seq.*

58. 42 C.F.R. § 78.210(c) (1972).

59. During the course of the hearings on the Act the NCRP standard was discussed on numerous occasions. For the most part, comments critical of the standard tended to indicate that it is, if anything, too stringent. See, e.g., letter by Dr. V.P. Bond, *supra* note 24, and 1968 *Senate Hearings*, *supra* note 8, at 670. It was apparently never suggested that this standard is inadequate as a measure of safety, although Ralph Nader did hint that the NCRP standard pertaining to X-ray machines might be weak. *Id.* at 736.

60. In hearings before the House Subcommittee on Public Health and Welfare, Mr. Seymour Becker, Chief of the Radiation Control Unit of the Suffolk County (New York) Department of Health, discussed a door-to-door testing program conducted by his Unit. Home televisions were tested for excessive radiation and, when one was found to emit X-rays, a repairman was called in to correct the set. Mr. Becker testified that:

... when correcting the thousand sets, of that 5,000 that we surveyed, we were able to bring the levels of radiation down to natural background radiation. In other words, we didn't bring it down to 0.5 mr/hr; we brought it down even further.

1969 *House Hearings*, *supra* note 14, at 277, 278.



It should also be noted that, while the Act speaks generally about protection of the public from the dangers of electronic product radiation, it also speaks about minimizing the exposure of people to "unnecessary electronic product radiation."<sup>61</sup> This language seems to reflect the testimony of several witnesses at the hearings who suggested that any unnecessary exposure to radiation should be prevented.<sup>62</sup> It is at least arguable, then, that Congress intended the Secretary to prescribe performance standards which would prohibit any electronic product radiation that is deemed to be "unnecessary", even though such is not likely to be hazardous. Assuming this to have been the case, the first objective of the Act can then be interpreted to mean that (1) if all radiation cannot be (practicably) eliminated from a product, the amount radiated must be non-hazardous; and (2) if all the radiation from a product *can* be eliminated (or reduced to the level of background radiation), any detectable amount of radiation emitted by the product is therefore "unnecessary" and should not be allowed.

Under this interpretation, the first objective, as it applies to television sets, may not have been achieved. If the evidence referred to above (at note 59) is accepted as being true, it is apparent that the performance standard presently in effect for televisions *does* permit the marketing of sets which emit "unnecessary" radiation, because such radiation can be easily eliminated.

## 2. *The Second Objective*

Presumably the second objective of the Act has also been accomplished. As mentioned before, the Act requires that every electronic product manufactured for sale in this County bear a label or tag certifying that it conforms to the established standard.<sup>63</sup> The basis of such certification is, again, either the individual testing of each item produced, or "... a testing program which is in accord with good manufacturing practice..."<sup>64</sup>

In reviewing the testimony given during the hearings on the Act concerning the problem of assuring that each item sold meets the standard, it is difficult not to conclude that the legislators gave too little attention to this problem, and that the witnesses (usually representing

61. 42 U.S.C. § 263d(a)(2) (1971). (emphasis added)

62. See, e.g., language quoted in the text at notes 1 and 3, *supra*.

63. 42 U.S.C. § 263f(h) (1971); See also the corresponding regulations at 42 C.F.R. § 78.201 (1972).

64. 42 U.S.C. § 263f(h) (1971); Note, as mentioned above at notes 27 and 28, three bills were submitted to Congress during 1967 and 1968 on the problem of electronic product radiation. One of these, S. 3211, would have required the testing of each individual item manufactured which was subject to a performance standard. No alternative testing program would have been authorized. (The text of S. 3211 is reproduced in 1968 *Senate Hearings*, *supra* note 8, at 410-417. The relevant provision is § 357 (e), *id.* at 412). The Bill ultimately enacted was H.R. 10790.



industry) made little effort to explain the problem clearly. For example, prior to the promulgation of the standards (but after the Act had been passed), the House Subcommittee on Public Health and Welfare held hearings on the administration of the Act.<sup>65</sup> Testifying on the methods by which manufacturers would make certain that all items produced in an assembly line meet the standards, Mr. Edward Day, a lawyer representing the industry, described the "quality control procedure" used by manufacturers as a

...random sampling, ... by established scientific methods ... whereby what has been determined to be a proper and adequate sample is withdrawn at the end of the manufacturing process and is checked very thoroughly. ...<sup>66</sup>

This seemed to imply that a random sampling will suffice to insure that all items from a production line will be within the standard.

The Subcommittee seemed to accept the sufficiency of "quality control testing" of the end product as portrayed by Mr. Day, in spite of the fact that this method was criticized in a written report submitted to the Subcommittee by the Bureau of Radiological Health earlier in the hearing.<sup>67</sup> No one raised this point in oral testimony before the Subcommittee.

It is submitted that the concept of quality control techniques as presented is less than completely clear. As a rule, random sampling techniques are *not* applied to assembled functional units (*i.e.*, units that consist of many parts and are at a stage of assembly at which they can be operated).<sup>68</sup> Generally, random sampling techniques are applied only to component parts as a means of increasing the likelihood that, upon assembly, the functional unit (into which the parts are installed) will operate satisfactorily for a predetermined period of time.<sup>69</sup> It is clear, however, that if it is intended that none of the assembled television receivers radiate in excess of the standard, this goal should be considered as part of the operating criteria of the television receiver, and *each* set should thus be tested for radiation, just as each set is tested to see if the volume control, picture tube, etc., operate properly. Otherwise, the certification means no more than that within a certain probability a given television receiver conforms to the standard.

---

65. 1969 House Hearings, *supra* note 14.

66. *Id.* at 290.

67. *Id.* at 30.

68. MIL-H-217, DEPARTMENT OF DEFENSE, MILITARY STANDARDIZATION HANDBOOK, RELIABILITY STRESS AND FAILURE RATE DATA FOR ELECTRONIC EQUIPMENT, at 1 (1962).

69. *Id.*



One might argue that the civil penalty imposed for selling a set not in conformance with the standard will deter manufacturers from selling such receivers.<sup>70</sup> However, it might be suggested that as the testing procedures used by a manufacturer must be approved by the Secretary (or at least "not disapproved"),<sup>71</sup> the manufacturer may argue that non-culpability in a given case may be established by this governmental "approval".

Thus it is possible that a manufacturer could employ an "approved" system of random sample testing which might insulate him from civil penalties, yet might nonetheless result in the production and sale of products which do not conform to the established standard. To this extent, then, the second objective is not achieved, in that potentially dangerous items could conceivably still be marketed.

### 3. *The Third and Fourth Objectives*

The third and fourth objectives of the Act, eliminating radiation in excess of the standard resulting from component failure and from the improper repair of television receivers, will be quite difficult to achieve because these objectives are inherently tied to the regulation of the repair industry. The Act itself has no provision pertaining to these problems. However, the radiation control programs required under the Act (undertaken by the Bureau of Radiological Health) do address themselves to the problem of television repair.<sup>72</sup> So far these programs have taken the approach that the manufacturer is responsible for the general service practices employed in repairing his product. The tendency has been to assume that the manufacturer, by controlling the design of the product and by disseminating the information needed by repairmen, can in effect control the activities of the repair industry.<sup>73</sup>

On the other hand, perhaps the nature of the problem was not fully perceived by those conducting the hearings, and the witnesses may have been willing to allow the legislators to proceed on skimpy knowledge. In discussing the omission of variable resistors from high-voltage circuits as a means of preventing television repairmen from adjusting the voltage above the design limits (and thereby increasing radiation from the

---

70. See text at note 52, *supra*.

71. 42 U.S.C. § 263f(h) (1971).

72. Such programs are required under Section 356 of the Act (42 U.S.C. § 263d), and are to be undertaken by the Secretary of Health, Education, and Welfare. In initiating such programs, the Bureau of Radiological Health (an agency of the Department of Health, Education and Welfare) set out a number of objectives, one of which was to "... (6) review servicing procedures recommended by the manufacturer for receivers currently on the market, ...." 1969 House Hearings, *supra* note 14, at 25.

73. See, X-RADIATION CONTROL PROGRAM IN THE COLOR TELEVISION INDUSTRY—SUMMARY REPORT ON VISITS TO MANUFACTURERS, MAY 1968 - DECEMBER 1968, 1969 House Hearings, *supra* note 14, at 30-32 ("Observations").



set), the Committee members seemed to accept the notion that by simply eliminating the variable resistors the problem would be solved.<sup>74</sup> They seemed to miss the significance of a brief statement made by an industry representative to the effect that any repairman could easily replace a fixed resistor in order to change the voltage to the picture tube.<sup>75</sup> In fact, a television serviceman can, and may actually, replace almost any component of a receiver and thereby alter its performance characteristics.

It should be noted in this connection that the 24,000,000 color television sets produced prior to 1970<sup>76</sup> are not subject to the performance standards promulgated by the Secretary.<sup>77</sup> Moreover, it is very likely that many of these have by now seen numerous repairs. It cannot be over-emphasized that the repair of television sets, especially those not manufactured under the requirements of the Act, should be closely regulated.

The problem, of course, is how to regulate such repairs effectively. As has been seen, the regulation of television manufacturers may have little effect in most cases on repair activities. The apparent solution, then, would seem to be the regulation of the repair industry itself. Unlike the manufacturers, however, repairmen are not to be found in a few central locations where they can easily be watched over and communicated with. Instead, they are well dispersed throughout the entire Country and, as such, are not particularly good subjects for a nationally centralized regulatory program. As will be seen, however, the solution to this problem may be found at the state level of government.

With respect to the problem of component malfunctions, similar considerations are involved. Unless a component is defective when it leaves the factory, it would seem that the repairman is in the best position to recognize and replace a part that has gone bad. Again, this suggests some form of regulation of the repair industry. This notion will be further developed in the following sections.

### III. CALIFORNIA LAWS RELATING TO RADIATION AND ELECTRONIC REPAIR DEALERS<sup>78</sup>

The foregoing material provides compelling reasons for concluding that the Act, in order to be effective, must be supplemented by programs at the state level. Congress recognized this and provided that the

---

74. 1969 House Hearings, *supra* note 14, at 286, 287.

75. *Id.* at 287, line 9. It should be pointed out that, by increasing the voltage to the picture tube, a better quality picture can often be achieved. Thus, repairmen may be inclined to perform such adjustments, rather than telling their customers that they need a new picture tube.

76. See text at note 5, *supra*.

77. 42 C.F.R. § 78.210 (a) (1972).

78. The laws of this State will be examined in order to depict the desired role of every state in helping to achieve the Federal objectives.



Federal agency administering the Act can accept assistance from state and local agencies in its administration and enforcement.<sup>79</sup> Moreover, the studies required under the Act are to give attention to the feasibility of authorizing the Secretary

...to enter into arrangements with individual states or groups of states to define their respective functions and responsibilities for the control of electronic product radiation....<sup>80</sup>

Such agreements are not only authorized, but in a sense are also required by the Act.

California has enacted two laws, both of which touch upon the areas covered by the Act. However, in their present form, these laws do not complement this Federal law.

In 1961, California enacted the Radiation Control Law,<sup>81</sup> which was intended to supplement the Atomic Energy Act of 1954.<sup>82</sup> Then in 1963, California passed the Electronic Repair Dealer Registration Law<sup>83</sup> which was designed to regulate business practices in the electronic repair industry.

#### A. *The Radiation Control Law*

The Radiation Control Law basically provides for a regulatory program to control ionizing radiation. The purpose of the Radiation Control Law is to create programs that:

- (a) Effectively regulate sources of ionizing radiation for the protection of the occupational and public health and safety.
- (b) Promote an orderly regulatory pattern within the State, among the states, and between the Federal government and the State, and facilitate inter-governmental co-operation with respect to use and regulation of sources of ionizing radiation to the end that duplication of regulation may be minimized.
- (c) Establish procedures for assumption and performance of certain regulatory responsibilities with respect to byproduct, source, and special nuclear materials.
- (d) Permit maximum utilization of sources of ionizing radiation consistent with the health and safety of the public.<sup>84</sup>

Ionizing radiation is defined by this law as meaning "... gamma rays and X-rays; alpha and beta particles, high-speed electrons,

79. See notes 40 and 55, *supra*, and accompanying text.

80. Note 40, *supra*.

81. Cal. Stats. 1961, c. 1711; CAL. HEALTH & SAFETY CODE § 25800 *et seq.* (West 1967).

82. CAL. HEALTH & SAFETY CODE § 25802 (West 1967), and § 25856 (West Supp. 1973).

83. Cal. Stats. 1963, c. 1492; CAL. BUS. & PROF. CODE § 9800 *et seq.* (West 1964).

84. CAL. HEALTH & SAFETY CODE § 25802 (West 1967).



neutrons, protons, and other nuclear particles; but not sound or radio waves, or visible, infrared, or ultraviolet light."<sup>85</sup> A separate definition of non-ionizing radiation is not provided, nor is there any provision for its regulation.

The administration of this law is assigned to the State Department of Health and Safety<sup>86</sup> (hereinafter referred to as the Department). Note that subsections (b) and (c) of the above quoted provision indicate that the State should engage in co-operative programs with other states and the Federal Government, and assume certain regulatory responsibilities which might be delegated to it by the Federal Government. It is provided that the Governor has the authority to enter into such agreements with Federal agencies, but the agreements must be ratified by law.<sup>87</sup> The Department is also authorized to agree with the Federal Government, as well as with other states and interstate agencies, to develop co-operative programs of inspection (of potential sources of radiation).<sup>88</sup> At the present time this law contains the provisions of an agreement between California and the Atomic Energy Commission under which certain regulatory functions of the AEC are taken over by the State.<sup>89</sup>

The Radiation Control Law further authorizes the institution of training programs by the Department or other State agencies, in order to secure qualified personnel to carry out the provisions of the law. Such trained personnel may be made available for use by the Federal Government, other states, or interstate agencies.<sup>90</sup> The significance of this will be discussed in a later section.

A number of rules are imposed by the Radiation Control Law for regulating sources of ionizing radiation. For the purposes of this discussion, though, these rules need not be considered in detail. It is important to note, however, that this law pertains only to *ionizing* radiation. Since X-rays produced by television receivers are a form of ionizing radiation, it is possible that this law would apply to such products *if* it were to be construed along certain lines.<sup>91</sup> It would not apply, however,

---

85. CAL. HEALTH & SAFETY CODE § 25805(b) (West Supp. 1973); See Glossary, Appendix Two.

86. CAL. HEALTH & SAFETY CODE §§ 25810, 25811 (West Supp. 1973).

87. CAL. HEALTH & SAFETY CODE § 25830 (West 1967).

88. CAL. HEALTH & SAFETY CODE § 25835 (West 1967).

89. CAL. HEALTH & SAFETY CODE §§ 25875, 25876 (West 1967).

90. CAL. HEALTH & SAFETY CODE § 25836 (West 1967).

91. As mentioned previously in the text at note 82, *supra*, this law was intended to supplement the Atomic Energy Act of 1954. This would seem to indicate that its primary intended purpose was to control ionizing radiation produced by radioactive materials. This might explain in part why sources of non-ionizing radiation are not covered. In any event, no mention of televisions is made in this law (although this may be due to the fact that the problem of television emissions was not recognized until a few years after this law was enacted), but the law's reference to the "sources" of ionizing radiation does seem broad enough to include television sets.



to many potentially hazardous sources of *non-ionizing* radiation, such as microwave ovens,<sup>92</sup> for example. It might be interesting to recall that the Federal Act *does* purport to regulate sources of non-ionizing radiation.<sup>93</sup>

It will be suggested below how a state law, similar to California's Radiation Control Law, might be amended so as to provide more effective protection from hazardous radiation, and thereby also help to achieve the objectives of the Federal Act.

### B. *The Electronic Repair Dealer Registration Law*

The Electronic Repair Dealer Registration Law was enacted primarily for the purpose of regulating business practices in the repair industry. Under this law, a repair or "service dealer" is defined as any

... person who, for compensation, engages in the business of repairing, servicing, or maintaining television, radio, or audio or video recorders or playback equipment normally used or sold for use in the home or in private motor vehicles.<sup>94</sup>

The administration and enforcement of this law is assigned to the Director of the Bureau of Repair Services (hereinafter referred to respectively as the Director and the Bureau), which is itself within the California Department of Consumer Affairs.<sup>95</sup>

The Director is vested with the authority to establish regulations for the conduct of service dealers, for the administration of the law, and for the general protection of the public from improper business practices.<sup>96</sup> The Director is also required to prepare an annual roster of all registered service dealers. Copies of this roster are to be made available to the public.<sup>97</sup> Every service dealer in the State is required to register with the Bureau,<sup>98</sup> and a failure to do so may be punished as a misdemeanor.<sup>99</sup>

The Electronic Repair Dealer Registration Law makes no provision for regulating repair practices which might affect a given product's capability of emitting harmful radiation. The possibility of amending this law to cover such problems will be discussed below.

---

92. See *Microwave Ovens: Not Recommended*, CONSUMER'S REPORTS, April 1973, at 221.

93. See the definition of "electronic product radiation" used by the Federal Act, in the text at note 34, *supra*.

94. CAL. BUS. & PROF. CODE § 9801(g) (West Supp. 1973); Note: effective June 30, 1973, this provision will also include persons who repair, etc. "any appliances". Cal. Stats. 1972, c. 1288, p. . . § 2.5.

95. CAL. BUS. & PROF. CODE § 9810 (West Supp. 1973).

96. CAL. BUS. & PROF. CODE § 9814 (West 1964).

97. CAL. BUS. & PROF. CODE § 9815 (West 1964).

98. CAL. BUS. & PROF. CODE § 9830 (West Supp. 1973).

99. CAL. BUS. & PROF. CODE §§ 9840, 9850 (West 1964).



#### IV. A PROPOSAL FOR MORE EFFECTIVE LAWS

State laws similar to the two described above could very likely provide a suitable basis for extending the purpose and effect of the Federal Act. Under California's Radiation Control Law, the State Department of Public Health should by now have achieved some expertise in evaluating radiation hazards; and under the Electronic Repair Dealer Registration Law, repair practices have been brought under direct State control. Appendix One to this comment contains proposals for amending these laws so that they will conform to and supplement the Federal Act, and help to accomplish the objectives of protecting the public from electronic product radiation resulting from faulty components and improper repair practices. These laws, as they appear in their proposed forms, might serve as models for other states which presently have no similar legislation.

Under the proposed amendments, electronic product radiation, as defined in the Federal Act, would be brought under the control of the State Public Health Department. The Department would be required to establish programs, possibly in co-operation with the State Bureau of Electronic Repair Dealer Registration, for the regulation of electronic product radiation. Such programs should, following the precepts of the Federal Act, include the promulgation of rules or regulations to be observed by electronic repair dealers in servicing electronic products capable of emitting radiation. The program should also include the compilation and dissemination of information regarding potentially hazardous or defective components available on the market or already in use by consumers.

The adopted rules or regulations could be published and enforced by the Bureau of Electronic Repair Dealer Registration. In the repair of television sets, for example, repairmen could be required to:

1. Check the high-voltage, and if necessary adjust or reset it to its prescribed level;
2. Check certain components (such as the high-voltage shunt regulator and rectifier tubes) to assure that any parts known to be hazardous, as indicated by manufacturers' bulletins and those of the State Department of Public Health or of the Federal Government, are immediately replaced (at manufacturer's cost, as required by the Federal Act) with non-hazardous components; and
3. Check that all shielding on the set is in place as required by the manufacturer.



The program would also include the establishment of facilities and procedures for assuring that the equipment used by electronic repair dealers is properly maintained and calibrated.

Such a scheme, properly administered, could easily result in the effective reduction of radiation hazards in electronic products resulting from component failures, or from improper repairs of these products.

It should be noted that under the Federal Act, the Secretary of Health, Education and Welfare is allowed to make grants to public agencies in order to "...plan, conduct, coordinate, and support..." the training of personnel, and to "develop, test, and evaluate the effectiveness of procedures and techniques for minimizing the exposure to electronic product radiation..."<sup>100</sup>In 1971, \$1,200,000 were allocated under twenty-four grants for the training of 120 specialists and 110 technicians in the field of electronic product radiation.<sup>101</sup> Funding requests for the fiscal year 1972 were at the same level.<sup>102</sup>

In implementing the type of program discussed above, a state might well obtain a substantial grant from the Federal Government. It might be recalled that California has already laid the foundation for the institution of personnel training programs<sup>103</sup> and other programs for the detection and control of certain radiation hazards.<sup>104</sup> If the proposed amendments were to be adopted by this State, the acquisition of a Federal grant would certainly help to defray the additional expenses involved in expanding these programs to conform to the new provisions.

## V. CONCLUSION

The Radiation Control for Health and Safety Act of 1968 attempts to eliminate public exposure to unnecessary radiation, establishes performance standards for maximum emission of radiation by electronic products, attempts to prevent the sale in this country of electronic products that emit radiation in excess of these standards, and also attempts to prevent the emission of radiation in excess of these standards by electronic products as a result of component failure or improper repair of the product.

The performance standard established under the Act for television sets, 0.5 mr per hour at 5 cm, is detectable above the background radiation. Since virtually all radiation can be eliminated this represents

---

100. 42 U.S.C. § 263d(b)(2) (1971).

101. *Hearings on H.R. 10061 Before a Subcommittee of the Senate Committee on Appropriations*, 92nd Cong., 2d Sess., pt. 5, at 3440 (1971).

102. *Id.*

103. See text at note 90, *supra*.

104. See text at note 84, *supra*.



unnecessary radiation, and it can therefore be argued that the existing standard does not meet the objectives of the Act. The standard should be: *no radiation detectable above the background level.*

To prevent the sale in this country of products that emit radiation in excess of the standards, manufacturers are to certify that each unit produced meets the existing standard for the particular product. However, under the Act, certification may be based on a testing program that ultimately involves testing only a predetermined portion of all the units produced. Such testing programs can, at best, assure only that a certain (presumably small) percent of the units sold will fail to meet the standard. Testing of each unit is not an unreasonable requirement. It can be argued that by not testing each unit, some units will be sold that do not meet the standards, and thus the objectives of the Act are not met. *The Act should require the testing of every unit manufactured.*

It is admittedly difficult to regulate the electronic repair industry at the national level. While the Act attempts to eliminate electronic product radiation that might occur after a product is sold, it contains no specific provisions for regulation of the electronic repair industry. The Act does, however, provide for programs to control electronic product radiation through joint Federal, state, and local efforts. In a sense the Act requires such programs, although it does not, of course, purport to compel state legislation. Clearly there is a need, though, to establish more controls through state legislation coupled specifically to the provisions of the Act.

The amendments to the California laws proposed in Appendix One present a feasible means of establishing more effective controls. Under these amendments, two State agencies already in existence would be able to control the practices of the electronic repair industry as they relate to electronic product radiation.

Revising the Federal Act and establishing state laws (as suggested by the proposed California amendments) would provide the greatest possible measure of assurance to consumers that their homes will be free from unnecessary radiation.

— J. J. CHAVEZ

— J. C. PIERSON



## APPENDIX ONE

## I. PROPOSED AMENDMENTS TO THE CALIFORNIA RADIATION CONTROL LAW\*

Section 25801 should be amended as follows:

Sect. 25801. Policy. It is the policy of the State of California, in furtherance of its responsibility to protect the public health and safety, to institute and maintain [a] regulatory *programs* for sources of ionizing radiation *and for electronic product radiation* so as to provide for: (a) compatibility with the standards and regulatory programs of the federal government, (b) an integrated system of regulation within the State, and (c) a system consonant insofar as possible with those of other states.

Section 25802 should be amended as follows:

Sect. 25802. Purpose. It is the purpose of this chapter to effectuate the policies set forth in Section 25801 by providing for programs to:

- (a) Effectively regulate sources of ionizing radiation *and electronic product radiation* for the protection of the occupational and public health and safety.
- (b) Promote an orderly regulatory pattern within the State, among the sates, and between the federal government and the State, and facilitate inter-governmental co-operation with respect to use and regulation of sources of ionizing radiation *and electronic product radiation* to the end that duplication of regulation may be minimized.
- (c) Establish procedures for assumption and performance of certain regulatory responsibilities with respect to byproduct, source, and special nuclear materials, *and with respect to electronic product radiation*.
- (d) Permit maximum utilization of sources of ionizing radiation *and electronic product radiation* consistent with the health and safety of the public.

Section 25805 should be amended by adding new subsections as follows:

Section 25805. Definitions as used in this Chapter: (Subsections (a) through (i) remain unchanged)

(j) "*Electronic product radiation*" means any ionizing or non-ionizing electromagnetic or particulate radiation or any sonic, infrasonic, or ultrasonic wave which is emitted from an electronic product as the result of the operation of an electronic circuit in such product.

(k) "*Electronic product*" means (A) any manufactured or assembled product which, when in operation, (i) contains or acts as part of an electronic circuit and (ii) emits (or in the absence of effective shielding or other controls would emit) electronic product radiation, or (B) any manufactured or assembled article which is intended for use as a component, part, or accessory of a product described in clause (A) and which when inooperatiom emits (or in the absence of effective shielding or other controls would emit) such radiation.

Section 25811 should be amended as follows:

Section 25811. Duties of Department. The Department shall, for the protection of public Health and Safety;

- (a) Develop programs for evaluation of hazards associated with use of sources of ionizing radiation.
- (b) *Develop programs for evaluation of hazards associated with electronic product radiation.*



## APPENDIX TWO

## I. GLOSSARY:

- A) *Electronic Product*:\* "Electronic product" means
- (1) any manufactured or assembled product which, when in operation,
    - (i) contains or acts as part of an electronic circuit and
    - (ii) emits (or in the absence of effective shielding or other controls would emit) electronic product radiation, or
  - (2) any manufactured or assembled article which is intended for use as a component, part, or accessory of a product described in subparagraph (1) and which when in operation emits (or in the absence of effective shielding or other controls would emit) such radiation.
- B) *Electronic Product Radiation* \* "Electronic product radiation" means--
- (1) Any ionizing or nonionizing electromagnetic or particulate radiation, or
  - (2) Any sonic, infrasonic, or ultrasonic wave, which is emitted from an electronic product as the result of the operation of an electronic circuit in such product.
- C) *Electromagnetic Radiation*:\* "Electromagnetic radiation" includes the entire electromagnetic spectrum of radiation of any wavelength. The electromagnetic spectrum (*See* diagram below) includes, but is not limited to, gamma rays, X-rays, ultraviolet, visible, infrared, microwave, radiowave and low frequency radiations.
- D) *Ionizing Radiation*: "Ionizing radiation" is radiation of sufficient energy to dislodge one or more electrons (negatively charged sub-atomic particles) from a material upon which it impinges. Such material may thus be left in an "ionized" state; that is, lacking electrons, it takes on a positive electrical charge. Ionizing radiation may also cause the material which it strikes to itself produce radiation (*E.g.*, X-rays, gamma rays).
- E) *Non-Ionizing Radiation*: "Non-ionizing radiation" is radiation of insufficient energy to dislodge electrons from materials which it strikes. Non-ionizing radiation may, however, produce a "mechanical agitation" within certain materials, and this can result in the generation of heat (*e.g.*, microwaves, as used to heat foods in a microwave oven).
- F) *Particulate Radiation*:\* "Particulate radiation" is defined as charged particles such as protons, electrons, alpha particles, heavy particles, etc., which have sufficient kinetic energy to produce ionization or atomic or electron excitation by collision, electrical attractions or electrical repulsion of uncharged particles such as neutrons, which can initiate a nuclear transformation or liberate charged particles having sufficient kinetic energy to produce ionization or atomic or electron excitation by collision (*e.g.*, particles emitted by the decay of radioactive materials).



(c) Develop programs, with due regard to compatibility with federal programs, for licensing and regulation of byproduct, source, and special nuclear materials.

(d) *Develop programs, with due regard to compatibility with federal programs, for controlling electronic product radiation, including (1) Establishment of a program in cooperation with the Bureau of Electronic Repair Dealers Registration, as authorized under article 8 (section 25836) of this chapter for the training of Bureau personnel, if necessary, in order that such Bureau personnel may determine that such procedures and equipment used in the repair of electronic products that affect the emission of electronic product radiation are effectively utilized so as to assure that electronic products repaired by electronic repair dealers are maintained in accordance with federally established standards relating to electronic product radiation. (2) The establishment of a program to collect and disseminate, in cooperation with the Bureau of Electronic Repair Dealers, information on electronic products as defined under subsection (j) (B) of Section 25805 that are determined by manufacturers, the federal government, or the Department, to be capable of emitting electronic product radiation in excess of federally established standards relating to electronic product radiation and are (i) available on the market as replacement items in the repair of electronic products or (ii) known to have been installed in electronic products in use by consumers.*

(e) *Formulate, adopt, and promulgate rules and regulations relating to control of electronic product radiation. (Re-letter present subsections (c) and (d) accordingly.)*

## II. PROPOSED AMENDMENTS TO THE ELECTRONIC REPAIR DEALERS REGISTRATION LAW.

Section 9801 should be amended as follows:

(Subsection (a) through (f) remain unchanged.)

(g) "Service dealer" means a person who, for compensation, engages in the business of repairing, servicing, or maintaining (A) *any manufactured or assembled product which, when in operation, contains or acts as part of an electronic circuit or normally used or sold for use in the home, (B) any manufactured or assembled article which is intended for use as a component, part, or accessory of a product described in clause (A)* (Subsection (h) remains unchanged.)

Section 9814 should be amended as follows:

Section 9814. Establishment and enforcement of Regulations. The director may in the protection of the public shall establish and enforce such regulations as may be reasonable for the conduct of service dealers and for the general enforcement of the various provisions of this chapter and of the provisions of Chapter 7.6 (commencing with section 25800) of Division 20 of the Health and Safety Code as they relate to electronic products [in the protection of the public].

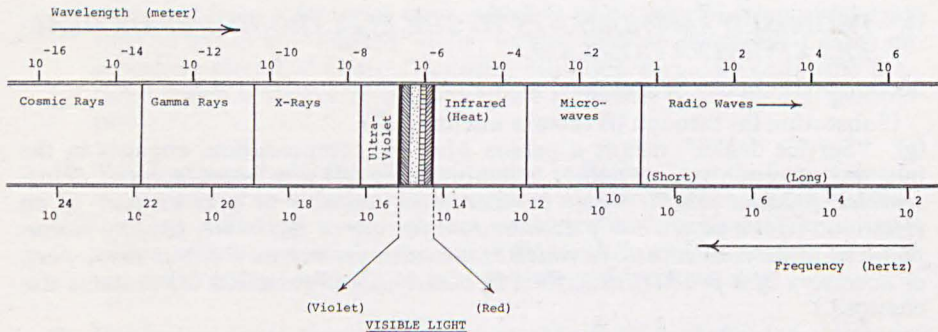


G) *Sonic Waves*:\* "Infrasonic, sonic (or audible) and ultrasonic waves" refer to energy transmitted as an alteration (pressure, particle displacement or density) in a property of an elastic medium (gas, liquid or solid) that can be detected by an instrument or listener.

\**Note*; Those definitions above indicated by an asterisk (\*) are taken from the Federal Regulations pertaining to the Radiation Control Act, its enforcement and interpretation (42 C.F.R. §78.100). The other definitions are provided by the authors. See generally *EISBERG, FUNDAMENTALS OF MODERN PHYSICS* (1961).

II. **ELECTROMAGNETIC RADIATION**: X-Rays are a form of radiant energy similar in nature to radio waves, visible light and microwaves, etc. These are all part of the "electromagnetic spectrum", diagrammed below. The characteristics of each distinguishable form of electromagnetic radiation depend on its frequency (cycles-per-second or *hertz*) which is inversely proportional to its wavelength (measured in meters). Sound waves ("sonic radiation") and particulate radiation are not forms of electromagnetic radiation and are not found on the electromagnetic spectrum.

### THE ELECTROMAGNETIC SPECTRUM



*Note*; The lines used to differentiate between the various categories of radiation are only approximated in this diagram. In reality there are no sharp lines of distinction; each type of electromagnetic radiation merges imperceptibly into each adjoining category.